

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF NEW YORK

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4 CHRISTOPHER STEVENS,

5 -versus-

13-CV-783

6 RITE AID CORPORATION d/b/a RITE AID PHARMACY,  
7 a/k/a ECKERD CORPORATION, d/b/a RITE AID.  
8 -----

9 TRANSCRIPT OF JURY TRIAL

10 held in and for the United States District Court, Northern  
11 District of New York, at the Federal Building, 445 Broadway,  
12 Albany, New York, on January 15, 2015, before  
13 the HON. THOMAS J. McAVOY, Senior United States District  
14 Court Judge, PRESIDING.

15  
16 APPEARANCES:

17 FOR THE PLAINTIFF:

18 HANCOCK, ESTABROOK LAW OFFICE

19 BY: DANIEL BERMAN, ESQ.

20 ROBERT WHITAKER, ESQ.

21 ROBERT THORPE, ESQ.

22 FOR THE DEFENDANT:

23 RAVEN, KOLBE LAW OFFICE

24 BY: KEITH RAVEN, ESQ.

25 RYAN DEMPSEY, ESQ.

1 (Jury present)

2 THE COURT: Morning, ladies and gentlemen. Who do  
3 you got for us?

4 MR. BERMAN: Thank you. I have Dr. Warfel for you.  
5 He's live this time so I won't be reading his testimony.

6 THE COURT: We're all thankful for that.

7 MR. BERMAN: Doctor Mark Warfel.

8 THE CLERK: Please come forward to be sworn. Would  
9 you tell us your name for the record, please.

10 THE WITNESS: Mark E. Warfel.

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Dr. Warfel - Direct

1 M A R K W A R F E L, having been called as a witness, being  
2 duly sworn, testified as follows:

3 THE COURT: Mr. Berman.

4 MR. BERMAN: Thank you.

5 DIRECT EXAMINATION

6 BY MR. BERMAN:

7 Q Good morning, Dr. Warfel.

8 A Good morning.

9 Q Would you state your name and business address for the  
10 record, please?

11 A Mark E. Warfel, 4401 Middle Settlement Road,  
12 New Hartford, New York 13413.

13 Q What is your profession, sir?

14 A I'm a family physician.

15 Q Where?

16 A In New Hartford, New York.

17 Q Can you tell us your educational background?

18 A I have a Bachelor of Science in pharmacy from  
19 Massachusetts College of Pharmacy. I have Doctorate of  
20 Osteopathic Medicine from the University of New England,  
21 College of Osteopathic Medicine. I'm a graduate of the Saint  
22 Elizabeth Family Medicine Residency Program and I've been  
23 Board certified in family medicine since 1991.

24 Q When did you get your osteopathic degree?

25 A 1988.

Dr. Warfel - Direct

1 Q Your pharmacy degree?

2 A 1977.

3 Q Can you tell us about your work background, what you do  
4 today?

5 A Starting from when?

6 Q Well, starting from when you got your osteopathic  
7 degree. When you became a doctor.

8 A Initially, I worked in the emergency department of one  
9 of the local hospitals in Utica for two-and-a-half years.

10 Q Which one was that?

11 A That was at Faxton Hospital at that time and then I  
12 entered into a private practice with a group of three other  
13 physicians and then I moved to the Saint Elizabeth Medical  
14 Center employment in 2000. At that time I became program  
15 director for the family medicine residency program there  
16 where we educate the last three years or the residency  
17 training for graduate physicians in family medicine.

18 Q And is that the position you still hold today?

19 A It's one of them. I'm also the director for medical  
20 education for Mohawk Valley Health Systems and am the program  
21 director for the residency program for family medicine and I  
22 also practice.

23 Q Did you ever work as a pharmacist?

24 A I did.

25 Q For how long?

Dr. Warfel - Direct

1 A Eight years.

2 Q And where was that?

3 A Alaska, in Vermont, Massachusetts and New York.

4 Q What type of pharmacy did you practice?

5 A I did hospital pharmacy, retail pharmacy. I was a  
6 clinical consultant pharmacist and I was also director of  
7 pharmacy at a hospital.

8 Q How long have you been -- well, strike that.

9 Do you treat Christopher Stevens?

10 A I do.

11 Q How long have you been treating Christopher Stevens?

12 A I believe about two decades.

13 Q When did you first become aware that Chris -- well,  
14 strike that.

15 Do you have an opinion within a reasonable degree  
16 of medical certainty with respect to whether Chris is afraid  
17 of needles?

18 A I do.

19 Q And how did you form that opinion?

20 A It was based on providing his care over those 20 years.  
21 Chris never or was often resistant to having blood work done.  
22 Did not want to receive immunizations himself because of fear  
23 associated with needles, which he explained to me and so I've  
24 known about it since that time.

25 Q Have you had conversation, did you have conversations

Dr. Warfel - Direct

1 with Chris about it?

2 A Yeah, we talked about it at his annual appointment when  
3 I would see him.

4 Q Was this something that you have noted in his records?

5 A I did note it in his records.

6 Q When was that?

7 A I would have to look but I believe it was around 2011.

8 Q Prior to 2011, you'd been treating him for how long?

9 A I guess about 15 years.

10 Q Did you note it in his records before that?

11 A No, I don't believe so.

12 Q Were you aware of it before that?

13 A Yes.

14 Q When did you first become aware and make this diagnosis  
15 with Chris?

16 A I can't tell you the exact date but I can tell you it  
17 was during the course of taking care of him and trying --  
18 normally we recommend people getting screening lab work or to  
19 receive immunizations, such as flu vaccinations.

20 Q Is there a reason why you didn't note it in his record  
21 prior to 2011?

22 A It really did not, was not acquired to interfere  
23 essentially with his function at that point. It was  
24 something we could manage and so I did not write it in there.

25 Q Did you recommend treatment for Chris?

Dr. Warfel - Direct

1 A I did not.

2 Q Why not?

3 A Because, in general, Chris is a healthy individual, did  
4 not require interventions in terms of blood work very  
5 frequently and the decision of vaccination is an individual  
6 one.

7 Q Are you aware what symptoms Chris suffered when faced  
8 with needles?

9 A Yes, I am.

10 Q What symptoms were those?

11 A He would become lightheaded, dizzy, he'd have an  
12 increased heart rate and he'd get very anxious.

13 MR. BERMAN: May I approach the witness, your  
14 Honor?

15 THE COURT: Yes, you may.

16 BY MR. BERMAN:

17 Q Doctor, I'm going to show you what's in evidence as  
18 Plaintiff's Exhibit 5. Do you recognize that?

19 A Once I get my glasses on I could. Yes, I do.

20 Q What is it?

21 A It's a statement from a self written on a prescription  
22 dated March 10, 2011 and it states Mr. Stevens is needle  
23 phobic and cannot administer immunizations by injection.

24 Q Why did you write this note?

25 A He requested it for his employer.

Dr. Warfel - Direct

1 Q Do you know why?

2 A I believe at that time he was being asked to -- I think  
3 attend a course related to immunization administration.

4 Q Doctor, I'm going to show you --

5 MR. BERMAN: May I approach the witness?

6 THE COURT: Sure.

7 Q I'm going to show you Plaintiff's Exhibit 9 that's also  
8 in evidence and ask you to turn to the second page of that  
9 document, tell me if you recognize the second page?

10 A I do.

11 Q And what is that?

12 A It's a memo to William Farley. It was from Christopher  
13 Stevens. It asked to provide information which I did provide  
14 as Mr. Stevens treating physician.

15 Q Okay. Now the handwriting on that document, is that  
16 your handwriting?

17 A That is.

18 Q Did you complete that?

19 A I did.

20 Q Was Mr. Stevens with you or did you speak with  
21 Mr. Stevens before completing that?

22 A He was not with me when this form was completed, no.

23 Q Can you read us the question, first the question and  
24 then your answer starting with number one.

25 A Sure. First question is are there any other



Dr. Warfel - Direct

1 restrictions or limitations resulting from your term  
2 trypanophobia? And I put Mr. Stevens has a fear associated  
3 with receiving or watching blood draws, hypodermic  
4 injections. He cannot watch surgical procedures or bleeding.

5 Q And the second question.

6 A Are there any other tasks, other than delivering  
7 immunizations by injection, that Christopher cannot do?  
8 Please see the attached pharmacist job description for  
9 summary of task. I put heavy lifting can cause pain related  
10 to his spermatocoele and low back pain.

11 Q And question three and your answer?

12 A Does Christopher have any other phobias other than  
13 delivering immunization by injection? The answer is, he's  
14 afraid of heights.

15 Q Question number four.

16 A What would the effects on Christopher be if he were to  
17 administer an immunization by injection?

18 Q What was your answer to that?

19 A He would become diaphoretic, hypotensive and probably  
20 faint and in parentheses, vagal response.

21 Q Can you explain to us what those terms mean?

22 A It would mean that diaphoresis becomes sweaty and  
23 hypotensive, his blood pressure would drop and fainting is I  
24 think understood.

25 Q And then question number five and your answer to that?

Dr. Warfel - Direct

1 A Are there any accommodations that would enable  
2 Christopher to perform the essential pharmacy function of  
3 administering immunization by injection? Please be specific  
4 so we can consider any reasonable suggestions you propose.  
5 My response was he cannot safely administer. Consider the  
6 scenario of Christopher Stevens trying to inoculate a person  
7 and fainting as the needle is placed into the skin. This  
8 would be unsafe for the patient and for Mr. Stevens.

9 Q Now, was that -- what did you base that conclusion on?

10 A This is based on my history of treating Mr. Stevens and  
11 discussions that we had had over the years that I did treat  
12 him.

13 Q When -- strike that. When did you next have any  
14 contact with Mr. Stevens regarding his needle phobia, do you  
15 know?

16 A I'd have to look at the record. I can't recall dates  
17 and times. I treat too many patients.

18 MR. BERMAN: May I hand him our binder?

19 THE COURT: Yes, you may.

20 Q Dr. Warfel, I'm going to show you what's has been  
21 marked for identification as Defendant's 12. Do you  
22 recognize that as your records?

23 A Yes, I do.

24 Q Would referring to those help you refresh your  
25 recollection?

Dr. Warfel - Direct

1 A It does.

2 Q Would you take a look through those and see if that  
3 refreshes your recollection?

4 A The next time I actually saw Mr. Stevens was 5/18/2012.

5 Q Did you have any communication with Mr. Stevens  
6 regarding his needle phobia in August of 2011?

7 A I did.

8 Q Okay.

9 A I should say the office did.

10 Q The office did. And you got a message from him, did  
11 you not?

12 A Yes.

13 Q And you responded to that message?

14 A I did.

15 Q At least you wrote a note on the message, is that  
16 correct?

17 A That's right. The normal process in the office would  
18 be a patient would call. This type of question would go to a  
19 nurse. The nurse would communicate to the patient, probably  
20 would communicate with me directly and then I would issue a  
21 response, unless I felt it was something I needed to speak  
22 directly with the patient about.

23 Q And does that refresh your recollection as to what the  
24 communication was and what your response was?

25 A Yes.

Dr. Warfel - Direct

1 Q Can you tell us what the communication was and what  
2 your response was?

3 A Basically, Mr. Stevens called with a question about his  
4 disability stating he would need a statement, would like to  
5 speak to a nurse about this. The nurse wrote the company  
6 wants him to at least attend the seminar on immunizations,  
7 wants a note stating Dr. Warfel feels going to a seminar on  
8 immunizations would have an adverse effect on his health  
9 status. And I entered a response that I cannot do that.  
10 Attending the seminar should not have a negative effect.

11 Q Did you say something else? Did you conclude with  
12 something about administering?

13 A I say then on the next line, giving shots might.

14 Q Was it your opinion at that time that Christopher  
15 Stevens could not give shots?

16 A Yes.

17 Q And was that an opinion you had within a reasonable  
18 degree of medical certainty?

19 A Yes.

20 Q And for the same reasons that you articulated in your  
21 response to those five questions?

22 A Yes.

23 Q Are you familiar with -- you did not recommend  
24 treatment for Christopher, is that correct?

25 A I did not.

Dr. Warfel - Cross

1 Q Are you familiar with desensitization --

2 A I am.

3 Q -- training? Tell me what you know about that?

4 A I can't say I'm an expert on the actual desensitization  
5 treatment itself. I know it's available but I have not, in  
6 my practice, had a patient with successful desensitization  
7 treatment.

8 Q At least for needle phobia?

9 A Well, for most any phobia.

10 Q So that was not a treatment you considered necessary,  
11 necessary or effective for Chris at the time?

12 A I did not.

13 MR. BERMAN: Thank you, Doctor.

14 THE COURT: All right. Mr. Raven, you may  
15 cross-examine.

16 MR. RAVEN: Thank you, your Honor.

17 CROSS-EXAMINATION

18 BY MR. RAVEN:

19 Q Take a second to set up here. Good morning, Doctor.

20 A Good morning.

21 Q We've met before, correct?

22 A Yes.

23 Q We met in your office back on July 2, 2014?

24 A Correct, I believe.

25 Q And that's the time I took your deposition, correct?

Dr. Warfel - Cross

1 A Correct.

2 Q All right. Now, Doctor, Mr. Berman gave to you a copy  
3 of your office records for Mr. Stevens, correct?

4 A Yes.

5 Q Okay. And those are in front of you now?

6 A Yes.

7 Q All right.

8 MR. RAVEN: I do not believe that Mr. Berman  
9 offered those into evidence, your Honor. At this time I'm  
10 going to, pursuant to stipulation, offer those records into  
11 evidence. It's Defendant's 12.

12 MR. BERMAN: No objection, your Honor.

13 THE COURT: Receive Defendant's 12 in evidence.

14 MR. RAVEN: Could I give the original copy to the  
15 witness?

16 THE COURT: Sure.

17 MR. RAVEN: Is it okay to take this one away from  
18 him?

19 THE COURT: Okay.

20 BY MR. RAVEN:

21 Q Dr. Warfel, I've handed you a copy of your office chart  
22 for Mr. Stevens. It's the same one we used for your  
23 deposition, okay?

24 A Okay.

25 Q It's the same one that Mr. Berman just showed you but

Dr. Warfel - Cross

1 now they're in evidence, okay. Let me just backup for a  
2 moment. You were Chris Stevens doctor since 2001, correct?

3 A I believe it predates that as well. Those records were  
4 related to the private practice I was in so I don't have  
5 access to those.

6 Q You've known him quite a while?

7 A I have.

8 Q And he has come to you from time to time for annual  
9 visits, checkups?

10 A Yes.

11 Q And perhaps if he had an illness, a cold, flu,  
12 something like that?

13 A Yes. For any episodic care that might occur.

14 Q And, Doctor, would it be fair to say that, and I think  
15 your records start with us at 2001, that's what we received  
16 from you. From 2001 up until March of 2011, is there any  
17 single notation before March 8 of 2011 in your notes  
18 indicating that Mr. Stevens has a fear of needles? It  
19 actually says that?

20 A I don't believe there is, no.

21 Q And the first time that you ever made a notation in  
22 your records as to Mr. Stevens fear of needles was on March 8  
23 of 2011, is that correct? If you can turn to P 718. Make it  
24 a little quicker.

25 A I appreciate that. Yes. I believe that's correct.

Dr. Warfel - Cross

1 Q And that's your first notation and that's after  
2 Mr. Stevens called your office and spoke to your staff saying  
3 that he needed a note indicating that he had a fear of  
4 needles, correct?

5 A That's correct.

6 Q So there's nothing before that?

7 A Not that I know of.

8 Q All right. Now, you've indicated that in your opinion,  
9 with a reasonable degree of medical certainty, that  
10 Mr. Stevens has needle phobia, correct?

11 A That's correct.

12 Q All right. You are not a psychologist, correct?

13 A No.

14 Q You are not a psychiatrist?

15 A No.

16 Q All right. And you don't treat needle phobia, correct?

17 A I do not.

18 Q All right.

19 A That's not to say that I don't have patients that have  
20 phobias. It means I don't provide specific treatment for  
21 those phobias.

22 Q And if you did suggest treatment, you'd refer them to  
23 somebody else?

24 A That's correct.

25 Q You didn't refer Mr. Stevens to anybody?



Dr. Warfel - Cross

1 A I did not.

2 Q Now, over the years between 2001, up until March of  
3 2011, you sent your patient for certain laboratory tests,  
4 correct?

5 A Yes.

6 Q And some of those tests included on an annual basis  
7 PSAs, correct?

8 A There would be, depending on his age at the time, there  
9 might have been a PSA test.

10 Q Keep your voice up.

11 A Depending on his age, there might have been PSA. I  
12 would have the to look.

13 Q Just take a look through. Could you explain to the  
14 jury what PSA is?

15 A Prostate-Specific Antigen. It's a blood marker that  
16 may have an association with prostate cancer screening. It's  
17 not a perfect test but it is routinely used.

18 Q Okay. Does it require the withdrawing of blood?

19 A It does. Since these are not in the order I keep them  
20 in the paper chart, maybe you can refer.

21 Q I think we found that out at the deposition. This is  
22 the order we got them from your office though.

23 A There's a PSA test which is on page 669 which is dated  
24 July 6, 2006. There's one also dated July 18, 2007.

25 July 15, 2008. There was blood work on July 1, 2009 although

Dr. Warfel - Cross

1 it's obscured by a piece of paper on the copy.

2 Q Doctor, I know you're reading at the same time, if you  
3 can keep your voice up so the jury can hear you.

4 A July 7, 2010, there's a PSA test. May 5, I'm sorry.  
5 May 18, 2011, a PSA test.

6 Q All right. Doctor, you can stop right there. Would it  
7 be fair to say from approximately 2006 onward, Mr. Stevens  
8 was sent for a PSA test that required the drawing of blood?

9 A Yes.

10 Q And that wasn't done in your office, that was done in  
11 an outside lab, Saint Elizabeth, the lab?

12 A Well, depending which draw station, there is a draw  
13 station in my office so....

14 Q Did you ever draw blood from Mr. Stevens to perform a  
15 PSA test, you personally?

16 A Personally, no.

17 Q Did you ever observe Mr. Stevens have his blood drawn  
18 for a PSA test in your office?

19 A I did not.

20 Q All right. Now, in addition to the PSA test, did you  
21 also send Mr. Stevens to have his blood drawn for a CBC, for  
22 a blood count?

23 A This was through that lab work, there was more than  
24 just a PSA test on some occasions.

25 Q All right. So that required also the drawing of blood

Dr. Warfel - Cross

1 from Mr. Stevens, correct?

2 A Same process, yes.

3 Q All right. And you personally did not do that,  
4 correct?

5 A That's correct.

6 Q And that wasn't done in front of you. It was done  
7 someplace else, correct?

8 A Correct.

9 Q Now, would it be fair to say that from at least 2001 up  
10 through and before March 8 of 2000 and including March 8 of  
11 2011, when Mr. Stevens asked you for the note about being  
12 needle phobic, that you never personally observed him get an  
13 injection, is that correct?

14 A That's correct.

15 Q You never injected him?

16 A I did not.

17 Q And you never saw him have his blood drawn for any  
18 reason whatsoever?

19 A Not to my knowledge.

20 Q All right. So on March 8, 2011 Mr. Stevens called your  
21 office, correct?

22 A He did.

23 Q And he spoke to somebody who answers your phone,  
24 correct?

25 A He did.

Dr. Warfel - Cross

1 Q And I want to take you to that March 8 note. If you  
2 could turn to P 718, please.

3 A Okay.

4 Q Now, first of all, on March 8 of 2011, does that note  
5 indicate who called?

6 A Yes, it does.

7 Q And who called?

8 A Elinor called.

9 Q Who is Elinor?

10 A Mr. Stevens' wife.

11 Q All right. And what does the message say? If you  
12 could read that slowly to the jury.

13 A Question about having blood work done, gets very ill  
14 when he sees a needle. Is this in his chart?

15 Q All right. Now was it, in fact, in his chart? I think  
16 you told it wasn't before March 8.

17 A There is an entry on his summary of care sheet that  
18 does show needle phobia but there is no date on that. I  
19 can't tell you specifically on that. That was when we were  
20 still paper lords.

21 Q You can't say before March 8, 2011?

22 A I cannot.

23 Q Is there an indication that your nurse called  
24 Mr. Stevens on that same day?

25 A Yes.

Dr. Warfel - Cross

1 Q All right. And is that in the response section of that  
2 note of March 8?

3 A That is.

4 Q All right. And could you read that to the jury,  
5 please?

6 A Needs a doctor's note saying he is needle phobic. Has  
7 job now requiring him to give flu shots. Could we provide  
8 this for him saying he's unable to give a shot because  
9 needles make him anxious when he gives blood. I'm not sure  
10 what the word is actually. When he gives blood. Is  
11 nauseated and shaking. Isn't sure he'll -- isn't sure if  
12 he'll have a problem giving shots.

13 Q Now, Doctor, I want you to focus for a moment on that  
14 last sentence. Isn't sure if he'll have a problem giving  
15 shots. Now, you told this jury based upon your recollection  
16 in your notes that you believe that he was needle phobic in  
17 terms of himself getting shots, correct?

18 A Correct.

19 Q All right. And in that note it specifically says from  
20 your nurse that he isn't sure if he'll have a problem giving  
21 shots. That information came directly from Mr. Stevens to  
22 your nurse, correct?

23 A I can't confirm it came from Mr. Stevens. It came from  
24 the caller, in this case it was Elinor, unless the nurse  
25 talked directly to Mr. Stevens at that time. The note

Dr. Warfel - Cross

1 doesn't indicate that.

2 Q But it was communicated to your office, correct?

3 A It was communicated, yes.

4 Q And after that notation was put in your chart, you then  
5 issued a short letter on a prescription pad which I think you  
6 have in front of you indicating that Mr. Stevens could not  
7 administer immunizations, correct?

8 A On March 10?

9 Q On March 10.

10 A Yes.

11 Q And, Doctor, that note seems to contradict the last  
12 sentence on P 719, correct? Because whoever called in says  
13 isn't sure if he'll have a problem giving shots.

14 MR. BERMAN: Objection, your Honor.

15 THE COURT: Basis?

16 MR. BERMAN: Contradicts.

17 THE COURT: Well, it's up to the jury to decide  
18 whether or not those statements contradict one another. He  
19 used that word in asking the question. I've instructed the  
20 jury that the lawyers' questions are not the evidence but the  
21 witnesses' answers are. So he characterizes it that way.  
22 The jury's going to hear what the doctor knew and what was  
23 told in the note. They can decide whether or not there's  
24 contradiction or not as they feel.

25 MR. RAVEN: Was it sustained, Judge?

Dr. Warfel - Cross

1 THE COURT: No. I apologize. I'll give you a  
2 quick one if you want from now on.

3 MR. RAVEN: That's fine. I think I get it.

4 BY MR. RAVEN:

5 Q All right. Doctor, could you answer that question?

6 A Could you repeat the question, please.

7 Q Sure. The note that you gave on behalf of Mr. Stevens  
8 that he could not immunize, does that contradict what is  
9 written in your chart, that last sentence on P 719, isn't  
10 sure if he'll have a problem giving shots. Does it  
11 contradict it?

12 A I don't believe it contradicts it, no.

13 Q So you went ahead and you issued the note saying he  
14 can't immunize, correct?

15 A I did.

16 Q And when you did that, you did not examine Mr. Stevens  
17 on that date, correct?

18 A Not on that day.

19 Q So from the time that phone call came in on March 10 to  
20 the time you issued the note on March 10, you didn't see  
21 Mr. Stevens?

22 A Between March 8 and March 10, no.

23 Q You didn't talk to Mr. Stevens, correct?

24 A I did not talk to him personally.

25 Q And you knew that his job was now requiring him to

Dr. Warfel - Cross

1 attend classes for immunizations, correct?

2 A I did not know that was required. I know he had sent  
3 the message about a -- he was asked to go to a course.

4 Q Okay. Well, if he was asking you for a note excusing  
5 him from the classes, did you assume that he was being  
6 required to go to the classes?

7 A I really didn't think that was my concern. He's asking  
8 me whether he should be giving immunizations and from our  
9 prior history, I did not think he should be giving  
10 immunizations. Simply because it's not in the record does  
11 not mean we haven't discussed it. There are many things I  
12 discuss with patients behind closed doors that do not go into  
13 their medical records of a personal nature, some other issues  
14 that would not be germane to their actual --

15 Q My only question is: You didn't see him, you didn't  
16 talk to him before you issued that note?

17 A I had been seeing him and talking to him for 20 years.

18 Q I'm only asking between those two dates.

19 A I did not see him between those two dates.

20 Q All right. Now, after you issued that note and  
21 indicated he couldn't immunize, and you're of the opinion he  
22 had needle phobia, did you send your patient for any  
23 treatment?

24 A I did not.

25 Q Okay. Did Mr. Stevens ever call you and say hey, look,



Dr. Warfel - Cross

1 my job's now requiring me to have, to do the immunizations  
2 and my job's at stake, can you send me for treatment? Is  
3 there treatment? Did he ever ask you?

4 A I don't have any phone messages to that regard.

5 Q Okay. Have you ever referred any other patients for  
6 treatment for needle phobia?

7 A I have not.

8 Q Okay. Have you sent any of your patients for treatment  
9 for any phobias?

10 A Yes.

11 Q What type of phobias?

12 A For snakes.

13 Q I'm sorry?

14 A Snakes.

15 Q Anything else?

16 A No. Snakes.

17 Q By the way, this needle phobia that you diagnosed, I  
18 think I heard you correctly, you told the jury it doesn't  
19 affect him in his daily life unless he's exposed to a needle,  
20 correct?

21 A That's part of a definition of phobia.

22 Q So this doesn't affect him on a daily basis, would you  
23 agree?

24 A Right.

25 Q And it doesn't affect anything else he does in life,

Dr. Warfel - Cross

1 it's only when he's exposed to the needles?

2 A Two things with phobia can be exposure to stimuli or  
3 can also be thinking of the stimuli.

4 Q Let's move up to May 20, 2011. You were asked to  
5 provide answers to five questions, correct?

6 A Would you reference that, please.

7 Q It was actually, I think it was in Exhibit 9 and it's  
8 also in your records, if I'm correct. It's on P 726.

9 A The same document?

10 Q Yes. The same document. All right. And that is --  
11 that's contained in your records as well, correct?

12 A Yes, it is.

13 Q Now, Doctor, I want to focus on question number five  
14 for a moment. Just refresh the jury's recollection on that.  
15 Just read the question again.

16 A Are there any accommodations that would enable  
17 Christopher to perform the essential pharmacy function of  
18 administering immunization by injection? Please be specific  
19 so we can consider any reasonable suggestion you may propose.

20 Q Okay. Now, when you answered that question, you  
21 already had a note in your chart from March 8 of 2011  
22 indicating that you weren't -- that the patient, himself,  
23 wasn't sure whether he'd be able to administer immunizations  
24 or shots, correct? You already had that note in your chart  
25 that's March 8?

Dr. Warfel - Cross

1 A Documentation by the nurse, yes.

2 Q That's something you would generally rely upon, notes  
3 from yours nurse?

4 A Well from that and from my taking care of Mr. Stevens  
5 for over 20 years.

6 Q Now, when you answered that question you were under the  
7 understanding, were you not, that what his employer was  
8 asking, is there something that you would recommend for your  
9 patient so that he would be able to perform the immunizations  
10 which was part of his job. Was that your understanding?

11 A Yes, that was.

12 Q All right. And you were of the opinion as of May 24,  
13 2011 that there's nothing his employer could do so that he  
14 could perform immunizations, is that correct?

15 A So he cannot perform them safely.

16 Q So he couldn't do them?

17 A Correct.

18 Q If he can't do them safe, he can't do them?

19 A Not just his safety but the safety of the person being  
20 immunized.

21 Q This would have been, in your opinion, dangerous for  
22 the patient and dangerous for Mr. Stevens?

23 A Yes.

24 Q So when you answered that question and the employer was  
25 asking you to provide recommendations, there's nothing that

Dr. Warfel - Cross

1 you can recommend at that point that would enable him to do  
2 those immunizations or at least to advise his employer as to  
3 what they can do for him, correct?

4 A That's correct.

5 Q All right. And I believe you said that  
6 desensitization, that's not something that you do, correct?

7 A That's correct.

8 Q And it's not something that you had ever recommended a  
9 patient for?

10 A Concerning needle phobia?

11 Q In terms of any phobia.

12 A I had sent people for treatment for phobias in the  
13 past.

14 Q Did that involve desensitization?

15 A It has.

16 Q But you'd never sent anybody for needle phobia before?

17 A I did not.

18 Q Are you aware that during the course of this litigation  
19 in approximately March of 2014 Mr. Stevens' attorneys sent  
20 him to the somebody, Dr. Dattilio, to render an opinion as to  
21 his needle phobia?

22 A I'm not aware of that, no.

23 Q Well, you met -- Dr. Dattilio's going to testify next.  
24 You met him this morning?

25 A I did.

Dr. Warfel - Cross

1 Q You continue to treat and see Mr. Stevens after March  
2 of 2000 and May of 2011, correct?

3 A Yes.

4 Q And you see him up until today?

5 A I sure hope so.

6 Q All right. At any time that you saw Mr. Stevens from  
7 the time that you answered those questions in May of 2011 up  
8 until today, did Mr. Stevens, your patient, ever tell you I  
9 saw a Dr. Dattilio who recommended some treatment for me?

10 A Not that I recall.

11 Q Okay. Do you recall Mr. Stevens telling you that  
12 anyone recommended desensitization behavioral modification to  
13 treat his needle phobia?

14 A No.

15 Q As far as you know, you're Mr. Stevens' internist --  
16 you're the only doctor that he sees?

17 A I'm a family physician. As far as I know I'm his  
18 family care doctor, not an internist.

19 Q When you wrote the answers to the questions in May of  
20 2011, did you consult with Mr. Stevens?

21 A No, I did not.

22 Q You didn't call him?

23 A I did not.

24 Q Okay. Did you talk to his wife Elinor?

25 A No. I had seen him in May of that year.

Dr. Warfel - Cross

1 Q Okay. So when you wrote those notes you just did it  
2 based upon whatever conversation you had had in the past with  
3 him and your records, correct?

4 A Yes. I believe records show he had a physical in May  
5 of 2011 I believe. May 13.

6 Q All right. Now, when Mr. Stevens asked you to write  
7 the note in March of 2011, did he tell you that he was simply  
8 being asked to go to classes?

9 A I did not have a conversation with Mr. Stevens about  
10 that.

11 Q Was there any notation in your records from your nurse  
12 or anyone else indicating that he was being asked to go to a  
13 class sponsored by his employer?

14 A There was a notation on that phone message that we  
15 talked about.

16 Q All right. Now, I want to move up to your note of  
17 August 19 of 2011. If you can turn to that and that,  
18 unfortunately, its Bate stamp wasn't on it, it's actually  
19 P 630. It doesn't have the Bate stamp in your notes but it's  
20 right after P 629. Do you have that?

21 A Yes, I do.

22 Q Now on August 19, 2011, does that note indicate that  
23 someone called your office regarding Mr. Stevens?

24 A It does.

25 Q Does it say who the caller was?

Dr. Warfel - Cross

1 A It would be Mr. Stevens in this case.

2 Q All right. So he, himself, called?

3 A Yes.

4 Q All right. And there's a message section there. Could  
5 you read that to the jury?

6 A The message from Mr. Stevens, has questions about  
7 disability. May need statement. Would like to speak to  
8 nurse about this.

9 Q All right. And then there's a response. Who wrote the  
10 response?

11 A One of the nurses in my office.

12 Q Okay. And do you know what that -- where that response  
13 came from? In other words, was there a further conversation  
14 with Mr. Stevens?

15 A Yes. The nurse -- the way the messaging again occurs  
16 in the office, the patient would call, it would initially go  
17 to one of our nonclinical people and referred to the nurse to  
18 get more information from the patient and return the call.

19 Q I'm going to ask you to bear with me for a moment.  
20 Read that response.

21 A The company wants to him at least attend a seminar on  
22 immunization, wants a note stating Dr. Warfel feels going to  
23 a seminar on immunizations would have an adverse effect on  
24 his health.

25 Q And then up the side again, if you could read to the

Dr. Warfel - Cross

1 jury what your response was to that?

2 A I cannot do that. Attending the seminar should not  
3 have a negative effect, giving shots might.

4 Q All right. So, Doctor, as of August 19, 2011, would  
5 the be fair to say that this note reflects that Mr. Stevens  
6 was asking for a note excusing him from the seminars?

7 A Yes.

8 Q Saying that he can't go?

9 A Yes.

10 Q Okay. It doesn't indicate in the this note that he  
11 asked for some type of release saying that he could go to the  
12 class, correct?

13 A Well, no, this didn't ask if he could go. Didn't need  
14 my permission to go.

15 Q Mr. Stevens has testified before this jury that he  
16 called your office on August 19, 2011 asking for a release  
17 saying that he could go to the classes. Your note does not  
18 reflect that?

19 A What was the date, please?

20 Q On August 19, 2011. Same date of your note.

21 A No, that's not what's recorded there.

22 Q All right. As a matter of fact it says just the  
23 opposite. He was asking for a note saying he couldn't go to  
24 the seminar?

25 A Correct.



Dr. Warfel - Redirect

1 Q And you were of the opinion with a reasonable degree of  
2 medical certainty that this would not be harmful for him to  
3 at least go to the classes on the immunization, correct?

4 That was your opinion?

5 A Correct.

6 Q Did you communicate that to Mr. Stevens?

7 A I didn't personally communicate. The nurse would have  
8 communicated.

9 Q And that was your practice to have the nurse  
10 communicate that to the patient, Mr. Stevens?

11 A Correct.

12 MR. RAVEN: Thank you, sir. I have no further  
13 questions.

14 THE COURT: Redirect?

15 MR. BERMAN: Just a few, your Honor.

16 REDIRECT EXAMINATION

17 BY MR. BERMAN:

18 Q Sticking with the August 19 message, your response does  
19 still opine that he can't give the shots, does it not?

20 A Yes.

21 Q He can't give the immunizations whether he can attend  
22 the class or not?

23 A That's correct.

24 Q You were asked if your March 10 note was somehow  
25 contradictory to the message that lead you to write it and

Dr. Warfel - Redirect

1 you said it was not. Was your March 10 note your opinion?

2 A Yes. Yes, it was.

3 Q The responses that you gave to the questions, those  
4 were your opinions? The May 24 response.

5 A Yes.

6 Q Within exhibit?

7 A Nine.

8 Q Nine. If you can take a look at that. Would you check  
9 the date you signed that?

10 A May 24, 2011.

11 Q Now, the questions were not your words, were they?

12 A They were not.

13 Q Were you responding to the questions?

14 A That's correct.

15 Q So that the phrase essential function in question five  
16 was not your phrase, was it?

17 A It was not.

18 Q Would it be fair to say that with your response to  
19 Exhibit 5 you were just answering if there was anyway he  
20 could give immunizations?

21 A That's correct.

22 Q In terms of the effect that Chris' needle phobia had  
23 upon him, did it cause him to avoid things?

24 A Yes.

25 Q What types of things did it cause him to avoid?

Dr. Warfel - Redirect

1 A He did not get a flu vaccination on a regular basis.  
2 He did not want to have the blood work done on a regular  
3 basis, so we were usually able to prevail to get lab work  
4 done.

5 Q And did it cause him to avoid other situations where  
6 shots or needles, where he might be exposed to shots or  
7 needles?

8 A There weren't any other ones in my practice other than  
9 related to his immunizations.

10 Q And your answers are limited to just your experience  
11 with Chris, not how it affected him outside of your practice,  
12 is that correct?

13 A That's correct.

14 MR. BERMAN: Thank you, Doctor?

15 THE COURT: Mr. Raven, anything further?

16 MR. RAVEN: I have nothing further, your Honor.

17 THE COURT: Thank you, Dr. Warfel. You may step  
18 down, sir.

19 THE WITNESS: Thank you.

20 (Witness excused)

21 THE COURT: Mr. Berman?

22 MR. BERMAN: Thank you, your Honor. Call Dr. Frank  
23 Dattilio.

24 THE COURT: Didn't we have a conference in chambers  
25 regarding Dr. Dattilio?

Dr. Warfel - Redirect

1 MR. BERMAN: Yes, we have to do an offer of proof.

2 THE COURT: Ladies and gentlemen, I have to ask you  
3 to step aside. I have some questions of the attorneys as to  
4 what's to come next and we'll take care of that.

5 (Jury excused)

6 MR. BERMAN: We have Dr. Dattilio, your Honor.

7 THE COURT: You call him as a witness and we'll  
8 have him sworn.

9 THE CLERK: Doctor, please come forward to be  
10 sworn. Would you state your name for the record, please.

11 THE WITNESS: It's Dr. Frank M. Dattilio,  
12 D-A-T-T-I-L-I-O.

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Dr. Dattilio - by the Court

1 F R A N K D A T T I L I O, having been called as a witness,  
2 being duly sworn, testified as follows:

3 THE COURT: This procedure is not an unusual one.  
4 Sometimes when experts render opinions on various topics,  
5 there's a disagreement between plaintiff's side and  
6 defendant's side as to what essentially is going to be your  
7 testimony and in order for me to allow certain questions to  
8 be asked and answered, I have to understand basically what  
9 you're going to say in general. I mean, I'm not going to do  
10 any in depth.

11 THE WITNESS: I understand.

12 THE COURT: Here there was mention in your report  
13 of not only the trypanophobia which is the fear of injections  
14 or needles, depending on who you talk to, but also there was  
15 mention of obsessive compulsive behavior. You use language  
16 that would lead me to believe that there was some connection  
17 between the two or perhaps the plaintiff had both problems  
18 but they weren't in any way connected or one didn't grow out  
19 of the other or was exacerbated by the other. I'd like to  
20 hear what your explanation of that would be.

21 THE WITNESS: Sure. Do you want an open response  
22 or the response to his question?

23 MR. BERMAN: No, respond to the Judge's question,  
24 please.

25 THE WITNESS: Okay. All right. In this particular

Dr. Dattilio - by the Court

1 case, Mr. Stevens has obsessive compulsive disorder which is  
2 part of his personality disorder and was there prior to the  
3 development of any specific phobias that he experienced,  
4 namely fear of heights, fear of needles, blood, et cetera.  
5 So in this particular case, and I emphasize that, the OCD,  
6 Obsessive Compulsive Disorder, existed first and the others  
7 came second to that based on his experiences in his life and  
8 what manifests it or maintains it is the obsessive compulsive  
9 characteristics of his personality that contributes to him  
10 being resistant in certain areas.

11 THE COURT: Okay. Well that helps. As I  
12 understand it, you also opined that the obsessive compulsive  
13 behavior is a neurological problem, is that right?

14 THE WITNESS: Well, it can have -- it substrates in  
15 neurological functioning. We find that individuals are sort  
16 of hot wired, if I may use that term, to be obsessive  
17 compulsive.

18 THE COURT: So that's genetic rather?

19 THE WITNESS: Well, correct.

20 THE COURT: All right. In this case it's your  
21 opinion that was the plaintiff's situation?

22 THE WITNESS: Yes. I believe that's the way he's  
23 wired. That's the type of individual he is.

24 THE COURT: All right. Well thank you, Doctor. I  
25 don't want to probe any further. I don't want to get into

Dr. Dattilio - Direct

1 what the direct or the cross would be. That's up to you guys  
2 but I think I needed to establish those things to allow him  
3 to testify before this jury and I would listen to argument  
4 from either side as to whether or not he should be allowed to  
5 express the opinion.

6 MR. RAVEN: Can we do that outside the presence of  
7 the witness?

8 THE COURT: Sure.

9 MR. BERMAN: Can I ask him a couple questions  
10 though before we do that?

11 THE COURT: You can.

12 DIRECT EXAMINATION

13 BY MR. BERMAN:

14 Q Doctor, is it your opinion that the trypanophobia  
15 arises out of the OCD?

16 A In this case, yes.

17 Q Can you explain that?

18 A Yes. Because he is a very conscience individual and he  
19 is very control oriented, so he doesn't like situations in  
20 which he's often out of control and when he sees a needle or  
21 an injection or blood is drawn, there's a sense of  
22 surrendering or helplessness. That's a good part of his  
23 makeup.

24 Q Does it also affect -- the trypanophobia, does it  
25 affect his ability to give an injection?

Dr. Dattilio - Cross

1 A Yes. More so particularly he has to look at what he's  
2 doing. When one has to receive an injection or blood drawn  
3 they can look away, they can wait for the stick. When you're  
4 actually administering an injection you have to look at what  
5 you're doing and be conscious and that's where he's got a lot  
6 of problems.

7 MR. BERMAN: Thank you.

8 THE COURT: Mr. Raven.

9 CROSS-EXAMINATION

10 BY MR. RAVEN:

11 Q Dr. Dattilio, can a person have OCD without having  
12 trypanophobia?

13 A Absolutely and vice versa. An individual can have  
14 trypanophobia without OCD.

15 Q And prior to your seeing Mr. Stevens, had you ever seen  
16 any medical records reflecting that Mr. Stevens had OCD?

17 A Never.

18 MR. RAVEN: Thank you.

19 THE COURT: All right. Do you want to have  
20 argument outside the presence of the doctor now?

21 MR. RAVEN: Yes, please.

22 THE COURT: I think it's easier, if you don't mind,  
23 we'd ask you to step down and exit the room. We can go in  
24 the back room but there's another judge there who might take  
25 umbrage. Thank you very much, sir.



## Stevens vs Rite Aid

1 (Witness exits courtroom)

2 THE COURT: We will hear Mr. Raven first because  
3 he's objecting to testimony. I think I understand what the  
4 doctor's going to say.

5 MR. RAVEN: Your Honor, I think it is so  
6 prejudicial at this point to allow a jury to hear a diagnosis  
7 of a condition that can exist in and of itself without  
8 trypanophobia, something that was not presented to Rite Aid  
9 as a disability. They would have no way of knowing about it,  
10 being able to consider it in terms of a reasonable  
11 accommodation. More importantly, even if their analysis were  
12 it qualifies as an ADA disability, there's going to be  
13 testimony in this case from Jim Wickens, he was questioned on  
14 this at his deposition as to how he came to the conclusion,  
15 at least from Rite Aid's perspective, whether this patient  
16 had or Mr. Stevens had an ADA disability as defined under the  
17 statute. They never got to consider whatsoever that this  
18 gentleman may or may not have the OCD and to now allow the  
19 jury to take that into consideration, something that Rite Aid  
20 could never consider, is so different from just evaluating  
21 the trypanophobia and a phobia, whether it qualifies under  
22 the ADA. I believe that Dr. Dattilio's testimony is  
23 something that if it gets before the jury, Rite Aid just has  
24 no way of responding to that whatsoever and at this point to  
25 allow it to come in and then say Rite Aid's testimony is

## Stevens vs Rite Aid

1 going to be -- we only evaluated the trypanophobia. We never  
2 knew about it. He never advised us. He had never certainly  
3 been diagnosed with it. It's so prejudicial and I believe it  
4 really should not be permitted to come before this jury under  
5 403. It was never even diagnosed until after the litigation  
6 got started and more, importantly, diagnosed by an expert,  
7 not even a treating physician.

8 THE COURT: Mr. Berman.

9 MR. BERMAN: The trypanophobia, the fear of  
10 needles, which Rite Aid was aware of, Dr. Dattilio testified  
11 is an offshoot, came from an underlying condition but they're  
12 related. Rite Aid had, Rite Aid did not ask for any  
13 diagnosis. They didn't ask for any medical records. They  
14 asked five questions. I don't believe under the ADA you're  
15 required to provide a complete medical diagnosis. They  
16 didn't ask to examine. They didn't ask what the details  
17 were. Dr. Dattilio's report was provided many months ago.  
18 They had, Rite Aid had every opportunity to have him examined  
19 and to look into this and they haven't done so. But  
20 underlying this most importantly is Dr. Dattilio's testimony,  
21 Mr. Stevens suffers from trypanophobia. His trypanophobia  
22 comes from his OCD. And how his trypanophobia works is  
23 related to the fact that this is from OCD as opposed to maybe  
24 some other cause. But it's one condition, the disability is  
25 the trypanophobia but the details of Mr. Stevens'

## Stevens vs Rite Aid

1 trypanophobia include the fact that it's based on OCD.

2 THE COURT: Well, I think there's -- when the  
3 defendant argues about Rite Aid not being able to properly  
4 classify Mr. Stevens before they fired him because they  
5 didn't know about the OCD, they only knew about the  
6 trypanophobia, I think that is problematic but it misses the  
7 mark because I don't even think Mr. Stevens knew he had OCD  
8 until Dr. Dattilio diagnosed him with that, so he couldn't  
9 have disclosed that nor could Dr. Warfel have disclosed that  
10 to Rite Aid because they didn't know about it. And the  
11 problem -- the thing I see basically, I don't think the OCD  
12 really makes any difference. I think the whole thing is  
13 about the fear of needles even though it arises out of an  
14 underlying neurological -- he didn't really -- he skirted  
15 that one but arising out of a neurological problem that he  
16 calls Obsessive Compulsive Disorder and so I just think  
17 that's a background thing. I don't think that is any more  
18 telling on what the jury's decision is going to have to be in  
19 this case. So under 403 I'm going to rule that the probative  
20 value is not exceeded by the prejudicial effect and I'm going  
21 to allow him to testify to that.

22 MR. RAVEN: Can I respond to that?

23 THE COURT: Certainly you can respond.

24 MR. RAVEN: Mr. Berman raises something very  
25 interesting. He says that Rite Aid could have examined him.

## Stevens vs Rite Aid

1 They could have asked for Dr. Warfel's records. Under the  
2 ADA and under the interactive process, they asked the  
3 treating physician, Dr. Warfel, what his condition was. They  
4 don't have -- they, the employer, doesn't have the obligation  
5 to look through all of his medical records and even if they  
6 did, it still wouldn't have been there. But more  
7 importantly, if there are many conditions, psychological  
8 conditions and neurological conditions that qualify under the  
9 ADA, depression, anxiety, OCD could be one of those.

10 THE COURT: Right.

11 MR. RAVEN: And what I'm afraid is that this jury  
12 could just take that fact alone, something that Rite Aid  
13 never got to consider when they did their research to  
14 determine whether they believe they had -- Mr. Stevens had an  
15 ADA disability. The jury could, in fact, take the OCD alone,  
16 without the trypanophobia, and determine that he has an ADA  
17 disability. How prejudicial, how more prejudicial can you  
18 get? They could hang their hats on that alone. Judge, if  
19 this case does go up to the Second Circuit --

20 THE COURT: Is that a threat?

21 MR. RAVEN: Well, no, no. That's not what I meant,  
22 but if somebody else does consider this, now you've  
23 interjected another factor into this case that Rite Aid never  
24 had an opportunity to evaluate.

25 THE COURT: I understand your argument. You have

## Stevens vs Rite Aid

1 some good points but Rite Aid did have an opportunity. Once  
2 Rite Aid came into possession of Dr. Dattilio's report, they  
3 had all the opportunity in the world to order, to ask for a  
4 deposition and go through all this stuff with him but you  
5 didn't do that.

6 MR. RAVEN: That wasn't my point. That's  
7 completely different from what I'm arguing.

8 THE COURT: Maybe it is but it's important to me.

9 MR. RAVEN: The issue is what was presented to Rite  
10 Aid at the time Mr. Stevens presented his ADA claim.  
11 Anything that happened during the course of the litigation,  
12 the jury doesn't consider. If there's another diagnosis  
13 that's made tomorrow, the jury doesn't consider that.  
14 It's -- the issue is what was the employer faced with at the  
15 time and at the time that they terminated him. They were not  
16 facing under any circumstances a diagnosis of OCD. They had  
17 no way of knowing it. Even if they had asked Dr. Warfel, he  
18 wouldn't have known and now the diagnosis is made after the  
19 fact, after the termination, after the litigation is started.  
20 How can we ask a jury to consider what Rite Aid was facing  
21 when they didn't know about it and even if they had sent him  
22 for 14 exams, which they're not obligated to do, who says  
23 they're going to diagnosis him with OCD. They didn't have an  
24 obligation to examine him at the time. They had an  
25 obligation to ask questions of his doctor. So now to allow a

## Stevens vs Rite Aid

1 diagnosis to come in after the fact is, I think, the most  
2 prejudicial thing that could ever happen in this case.

3 THE COURT: Well, that's okay. You can argue that.  
4 You can argue that to the jury but my ruling is that it's not  
5 and I'm going to allow the Doctor to put it before the jury.  
6 There's no way anybody could have told Rite Aid he had OCD  
7 until Dr. Dattilio diagnosed it recently. That doesn't mean  
8 this can't go before a jury and to say the jury's going to  
9 decide this case based on OCD, as opposed to trypanophobia,  
10 is pure speculation. I don't know that. You don't know  
11 that. You hope that's not the case. I don't know what's  
12 going to happen. What's the jury's going to do. Every time  
13 I try to divine that I'm wrong.

14 So my ruling is that this underlying  
15 diagnostic fact was discovered when Dr. Dattilio examined him  
16 way after he was fired by Rite Aid, but that doesn't mean it  
17 can't come before the jury as the doctor's opinion as to how  
18 the trypanophobia was anchored in the obsessive compulsive  
19 disorder. I don't know how else to say it. I'm not going to  
20 say it again. That's my ruling.

21 MR. RAVEN: Thank you.

22 THE COURT: You have an exception.

23 MR. RAVEN: Thank you, your Honor.

24 THE COURT: Although you don't need one.

25 MR. RAVEN: That's why I didn't do it.

Dr. Dattilio - Direct

1 THE COURT: Bring the jury in.

2 (Jury present)

3 THE COURT: All right, Mr. Berman, do you have a  
4 witness to call for us.

5 MR. BERMAN: I do. May I leave the courtroom for  
6 one moment to grab Dr. Dattilio?

7 THE COURT: Sure. No kibitzing.

8 MR. BERMAN: No kibitzing, your Honor.

9 THE COURT: The doctor has been sworn, ladies and  
10 gentlemen, so we don't need to swear him again. He's under  
11 oath.

12 DIRECT EXAMINATION

13 BY MR. BERMAN:

14 Q Good morning, Doctor.

15 A Good morning.

16 Q Would you state your name and business address for the  
17 record, please?

18 A Yes. It's Dr. Frank M. Dattilio, D-A-T-T-I-L-I-O. All  
19 one word, no apostrophe. My address is Suite 3904D, as in  
20 David, 1251 South Cedar Crest, two words, Boulevard,  
21 Allentown, Pennsylvania 18103.

22 Q And can you tell us your professional credentials, sir?

23 A I am a clinical and forensic psychologist.

24 Q What degrees do you have?

25 A I have a PhD in clinical psychology. I also have a

Dr. Dattilio - Direct

1 certificate of post doctoral training fellowship through  
2 Department of Psychiatry at University of Pennsylvania School  
3 of Medicine.

4 Q Where did you receive your PhD and when?

5 A I received my PhD from Temple University in  
6 Philadelphia in 1986 and subsequently my post doctoral  
7 training in fellowship through the Department of Psychiatry  
8 at the University of Pennsylvania School of Medicine.

9 Q And your post doctoral, tell us about your two post  
10 doctoral fellowships?

11 A One is in the field of cognitive therapy through the  
12 department of psychiatry in which I underwent training for  
13 the treatment of anxiety disorders, depression and  
14 personality problems. I later returned though for another  
15 fellowship in the department of psychiatry in forensic  
16 psychiatry/psychology where I was trained in the assessment  
17 of forensic matters, both civil and criminal.

18 Q What licenses and certifications do you hold?

19 A I'm licensed as a psychologist in the State of New  
20 York, New Jersey, Pennsylvania and Delaware. I'm also Board  
21 certified by the American Board of Professional Psychology.

22 Q And what present positions do you hold?

23 A Well, aside from being a clinical and forensic  
24 psychologist in private practice, I'm on the faculty of  
25 psychiatry at Harvard Medical School in Boston. I'm also



Dr. Dattilio - Direct

1 with the Department of Psychiatry at the University of  
2 Pennsylvania School of Medicine in Philadelphia.

3 Q Can you tell us about your clinical experience?

4 A Well, I have -- I've been in the field about 35 years.  
5 Close to it. I always conducted psychotherapy practice of  
6 treatment, anxiety and depression, couples and family  
7 problems. During the course of that time I was also actively  
8 involved in clinical assessment and later became involved in  
9 conducting assessments for courts, both on the federal and  
10 state level.

11 Q Going back to your faculty positions at University of  
12 Pennsylvania and Harvard, what is it that you teach at those  
13 institutions?

14 A Okay. My appointment is Department of Psychiatry at  
15 Harvard. I have taught in the residency training program, so  
16 when psychiatrists go through medical school, they go through  
17 four years of residency training and I taught the last two  
18 years of that PGY, post graduate year, three and four. And I  
19 will teach them particular techniques and assessment and  
20 treatment of anxiety, depression, family and couples  
21 problems.

22 In addition to that, I've also been part of the  
23 program of psychiatry and just this past year I started as a  
24 consultant to the Harvard Law School, they have what's called  
25 a trial advocacy program, so they take young lawyers like

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1 this man when they're in their third year of law school.

2 Q Did you say young?

3 THE COURT: He said like.

4 A I said like. In their third year of law school and we  
5 train them on how to conduct effective direct and  
6 cross-examination so that when they go out into the field  
7 they know, particularly with medical and  
8 psychiatric/psychological experts. The University of  
9 Pennsylvania, I supervise psychiatrists for many years who  
10 were part of the program of cognitive therapy so they're  
11 learning techniques for treating depression and anxiety and  
12 other disorders and more recently in the past 10, 12 years,  
13 I've been teaching in the forensic psychiatry fellowship  
14 program. So after a psychiatrist goes through medical school  
15 for four years and they complete their psychiatric residency  
16 for four years, they can opt to go through a fifth pathway or  
17 fellowship in a specific area. It could be sleep medicine,  
18 it could be different types and one is forensic psychiatry.  
19 So I teach that program. I also supervise and research in  
20 both areas.

21 Q How about professional publications of books or  
22 articles, can you tell us about those?

23 A Yeah. I have about 300 publications that include  
24 books, articles, chapters, many of which are on anxiety  
25 disorders, treatment of such. Some are in the forensic

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1 field. My works have been translated to about 30 languages  
2 used in aiding countries and training programs.

3 Q Do you have any specific education, training assessment  
4 and treatment of anxiety disorders?

5 A Yes. I've been fortunate to have some of the best  
6 training in the world. I worked under a Joseph Wolpe,  
7 W-O-L-P-E, MD. He was a psychiatrist at Temple University.  
8 He was known as the father of behavior therapy. He was one  
9 of the leaders that developed the specific treatments for  
10 phobias and anxiety disorders. And then I later went to work  
11 with the father of cognitive therapy, Aaron Beck, B-E-C-K.  
12 He's also a psychiatrist. He was at the University of  
13 Pennsylvania and that focused on the combination of cognitive  
14 and behavioral treatment for anxiety behavior disorders,  
15 depression and couples and family relationships.

16 Q And by the way, is Mr. Stevens' trypanophobia, is  
17 trypanophobia such a disorder?

18 A Yes. That's T-R-Y-P-A-N-O-P-H-O-B-I-A for the record.

19 Q What does that mean in layman's terms?

20 A Fancy term from the Greeks, everything's borrowed from  
21 the Greeks, that makes it difficult for us. Basically a  
22 needle or piercing phobia. Trypanohpobia comes from the  
23 Greek which is the sharp object or stick. So they refer to  
24 that as fear of needles, fear of sharp objects.

25 Q In what states have you -- have you been admitted as an

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1 expert in clinical and forensic psychology?

2 A State of New York, New Jersey, Pennsylvania, Delaware,  
3 Maryland. I've also been in the federal district, Eastern  
4 and Middle, of all those states.

5 Q Have you testified on behalf of either prosecution,  
6 plaintiff, defense and/or served as an expert for the Court  
7 on anxiety disorders?

8 A Yes.

9 Q Tell us about that, please.

10 A Well, many times I'm called to assess someone for the  
11 plaintiff or the defense in civil matters or it may be a  
12 criminal matter and if that's the case, then it might be  
13 either the prosecution or the defense. Many of the times  
14 have been for defense in criminal matters and also sometimes  
15 the Judge. When they have conflicting opinions, the Court  
16 has assigned me as their expert. It's not often but rarely.  
17 Once in a while the courts will say I'd like our own opinion  
18 to compare.

19 Q And you've been retained for that position?

20 A Yes.

21 Q How many times have you testified?

22 A Oh, hundreds. A lot of times.

23 Q All right. Let's turn to Mr. Stevens now. Did there  
24 come a time when you were asked to evaluate Mr. Stevens?

25 A Yes.

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1 Q And for what purpose?

2 A I was asked to assess whether or not his anxiety  
3 interfered with his ability to administer injections as part  
4 of his job.

5 Q And who asked you to do that?

6 A I was asked by Attorney Robert Thorpe.

7 Q That's Mr. Thorpe sitting right there, is it not, from  
8 my office?

9 A Yes, sir.

10 Q Did you evaluate him and when?

11 A I did.

12 Q Tell us about that.

13 A I conducted an extensive evaluation over two visits. I  
14 saw him on 3/5/14 and 3/7/14 and I did a very thorough  
15 history of his life from the moment of his birth, what he  
16 could tell me about his early years, all the way up until the  
17 present time which was 3/7/14.

18 Now in addition to that, I also administered a  
19 battery of psychodiagnostic tests and measurements. These  
20 are instruments that are designed to provide us with  
21 additional information over and above what we're getting  
22 verbally from the individual. It's an added measure of  
23 assessment, if you will, other than eyeballing them to use a  
24 crude term. So if you go to an emergency room with a  
25 complaint and they look at you, they examine you and they

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1 say, well, we think you may have this type of disorder.  
2 They'll also order an X-ray or a CAT scan or MRI to look at  
3 the surface. These measurements help us look below the  
4 surface. They're empirically based meaning they've been  
5 tested and weighted on norms against people that have certain  
6 disorders and who do not. So it helps us determine whether  
7 or not the individual has the criteria that they're  
8 complaining about and whether that's genuine, because some  
9 people can fake it and most of the time you can sense when  
10 they're not being honest, but also the tests are an added  
11 measure to tell us there's no inconsistencies to what they're  
12 saying. In addition I spoke with a family member. I  
13 interviewed his wife. I also reviewed a host of materials  
14 which I've listed on the first and second page of the report.

15 Q What were those materials?

16 A Read them into the record?

17 Q Yes, sir. The report is not in the record.

18 A Okay. I reviewed the original complaint which was  
19 filed in United States District Court, Northern District of  
20 New York. I also looked at the agreement concerning material  
21 covered by confidentiality, stipulated and protected  
22 agreement in the District Court. The defendant's answer to  
23 civil action that was filed. I also reviewed cover letter  
24 from Attorney Thorpe, relevant EEOC documents, including Rite  
25 Aid's position, statement. Mr. Stevens' response to Rite

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1 Aid's position, statement and the EEOC determination. I  
2 reviewed relevant pleadings to EEOC, including the amended  
3 complaint, the answer to the amended complaint and employment  
4 records and medical records for Mr. Stevens. There was  
5 correspondence from a Daniel Berman, Esquire, dated  
6 2/5/14. Determination from the United States Equal  
7 Employment Opportunity Commission in Buffalo, local office  
8 record, that was dated 2/20/2013. Correspondence to United  
9 States Equal Employment Opportunity Commission from a Cheryl  
10 Fyffe-Gauntlett, F-Y-F-E dash Gauntlett, G-A-U-N-T-L-E-T-T of  
11 Raven and Kolbe, LLP dated 8/31/12. I reviewed  
12 correspondence to a Mary Anne, two separate words, Drabczyk,  
13 D-R-A-B-C-Z-Y-K of the United States Equal Employment  
14 Opportunity Commission from Robert J. Thorpe, Esquire of  
15 Hancock and Estabrook, E-S-T-A-B-R-O-O-K, LLP, dated  
16 12/13/12. I've reviewed correspondence from the Mark Warfel,  
17 W-A-R-F-E-L, DO. From Michael J Sciotti, S-C-I-O-T-T-I,  
18 Esquire, dated 12/20/13.

19 Q Was that a letter attaching Dr. Warfel's records?

20 A Correct. Medical records of Mr. Stevens from the Saint  
21 Elizabeth's Medical Group, Faxton, F-A-X-T-O-N Street, Health  
22 Care, Steven J. Colver, C-O-L-V-E-R, MD, urologist and Norman  
23 Meslin, MD, colon/rectal specialist. I also reviewed the  
24 work, the work search history for Christopher Stevens dated  
25 8/23/12 to 10/11/13. Various correspondences that emanated

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1 from Rite Aid Pharmacy. Photocopies of Mr. Stevens' Bachelor  
2 of Science Degree in Pharmacy from Union University of Albany  
3 College of Pharmacy dated 6/4/77. Also a copy of Mr.  
4 Stevens' pharmacy license in the State of New York dated  
5 9/13/77. Current license, registration certificate for  
6 Mr. Stevens dated 9/30/13. Various materials from Rite Aid  
7 Pharmacy regarding clinical services and training. An  
8 Associate at Rite Aid Pharmacy, quote, an associate atlas,  
9 quote. Performance appraisals for salaried associates,  
10 Mr. Stevens, dated 8/20/08. A congratulatory letter to  
11 Mr. Stevens from Mr. Michael C. Feina, F-E-I-N-A for  
12 celebrating 40<sup>th</sup> year anniversary and a service award pin  
13 from Rite Aid to Mr. Christopher Stevens for 25 years of  
14 service.

15 Q Would it be fair to say that in performing your  
16 evaluation assessment you relied upon the medical records and  
17 the examination and interviews with Mr. Stevens and his wife?

18 A Yes.

19 Q The other materials were just background?

20 A That's correct.

21 Q All right. Tell the jury what you learned about  
22 Mr. Stevens' background?

23 A Well, in conducting a complete history I learned that  
24 he was the fourth of five children born in Utica, New York.  
25 He was raised in Utica. He was raised to an intact family,



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1 both mom and dad were in. Had a pretty good life growing up.  
2 There was no serious history of illicit drug or alcohol  
3 abuse. Father consumed alcohol but was never abusive or  
4 created any turmoil in the home. He also went to school,  
5 public school system and did fairly well. He was an A  
6 student. He had no real problems during his early school  
7 years. No adjustment issues. He was also a conscience  
8 student. He was an Eagle Scout at one point and he actually  
9 was somewhat shy. He didn't date very much during his later  
10 years. Always hard worker. He worked part time at 16 at a  
11 drugstore as a local cashier and then in the stockroom of the  
12 pharmacy and enjoyed himself. He was a good worker and had  
13 no problems on the job. First trauma came when he was a  
14 teenager. His father became ill with cancer and  
15 unfortunately he didn't live very long. He passed when  
16 Mr. Stevens was 18 years of age and this was tough because  
17 the family no longer had income from his father so his mother  
18 had to work and so did Mr. Stevens in order to help with the  
19 family. And mother was depressed for a while because she  
20 lost her spouse and so he was very supportive. She had her  
21 own bouts of depression that were related to bereavement  
22 according to him. He continued to work and go to school. He  
23 became interested in his work at the pharmacy and admired the  
24 pharmacy work. So the man who was head pharmacist who  
25 supervised him sort of started to encourage pharmacy as a

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1 field and I think that's where his interest developed and he  
2 encouraged him. He actually was instrumental in helping  
3 Mr. Stevens get a scholarship to go. So he graduated from  
4 high school and went, attended the Albany School of Pharmacy  
5 and, once again, was a good student. As and Bs. He really  
6 was never involved with any illicit drug or alcohol during  
7 his years. He tried a little bit of alcohol but he was not  
8 prone towards that and he didn't really date at all. He was  
9 rather shy. He got through pharmacy school and unfortunately  
10 within the five-year period of losing his father, his mother  
11 become ill with pancreatic cancer which was another blow  
12 because I think he was still reeling in the death of his dad.  
13 So he lost two parents within five years. Mom managed to  
14 hang on until he graduated but it was only four months after  
15 he graduated that she lost her struggle with cancer. So this  
16 was a tough lost for him and he and his brother had to take  
17 care of the estate. They really didn't have much but they  
18 lived in the house and they eventually sold it. During this  
19 time Mr. Stevens had come back. He passed his boards and  
20 became a pharmacist, ironically at the same pharmacy he had  
21 worked as a kid so it was sort of -- important for him and  
22 he. It was there that he met the love of his life who was a  
23 cashier. He started dating her and after four-and-a-half  
24 years they married. From that point Mr. Stevens went on to  
25 work as a pharmacist for decades. He worked in various

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1 locations and then eventually the store that he worked for  
2 was purchased by Rite Aid and he became employed at Rite Aid.  
3 The longest I think -- the period of time that he worked at  
4 any one store was in New Hartford. He remained there from  
5 1985 to 2000 and this was formally, I think, Carl's Drugs.  
6 C-A-R-L apostrophe S, and then eventually became Rite Aid.  
7 Guy that loved his work. He gave 110 percent. His patients  
8 loved him. Wherever he went he was very conscience. When  
9 there were other employees out he'd sometimes put in 80  
10 hours. That's a lot of hours to put in and he achieved it,  
11 status of head pharmacist and was always very conscience.  
12 Little obsessive compulsive with regard to files and having  
13 everything in order but that's a good thing, I think, in my  
14 opinion. We want people that monitor our medication or our  
15 health to be a little obsessive and he was. He was always  
16 diligent in his job and would go with the flow and he's the  
17 type of individual who is a pleaser in many ways. He follows  
18 the rules and does what he's told and this constituted him  
19 being a fairly good employee. He had gotten a couple of  
20 awards I think. I believe he got award for employee, for  
21 being a good employee and also he got a pin for being there  
22 for 25 years. And he worked until the problem arose with  
23 regard to the injections.

24 Q Did he develop any psychological disorders during the  
25 course of his life time?

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1 A Yes.

2 Q What were they or tell us about it?

3 A What is it?

4 Q What is it.

5 A What is it. Still here. Well, first of all, he has  
6 always been a very kind of obsessive compulsive type of  
7 individual. They put hundred percent into what they do.  
8 They're very fastidious and very conscience about work. You  
9 know, this dovetails with how he's been completely out of  
10 control with his life when he lost his folks. You're out of  
11 control, something you want to control but you can't. He  
12 loses his dad and then his mom. So this obsessive compulsive  
13 sort of nature became fortified because we sometimes deal  
14 with faith issues like death and loss but becoming overly  
15 controlling with what we can manipulate and so he threw  
16 himself into his work and very diligent about that. But he  
17 practiced his craft in an obsessive compulsive type manner.  
18 Very conscience about overchecking doses and scripts. If  
19 there wasn't something that was clear, he would call. I  
20 remember he told me one store he went to, files were messy,  
21 spent a lot of time organizing, making sure everything was in  
22 order and he could find it and his stores ran well. So, it's  
23 a disorder that he sort of made work for himself but the  
24 negative aspect of that was that he was sort of unyielding at  
25 times and a little bit rigid and he also developed some

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1 simple phobias. One to height and the other to needles and  
2 blood draw sticks. Again, things where it would promote not  
3 having a lot of control over the environment of the  
4 circumstance. Part of his nature. And certainly with that a  
5 little self focus because of his consciousness and these are  
6 disorders but, you know, in some ways, in many ways people  
7 allow them to work for them until there's a problem when they  
8 can't, they don't have a lot of elasticity or flexibility and  
9 then it becomes a more pronounced issue.

10 Q You mentioned he developed specific phobias. One of  
11 them was trypanophobia?

12 A Trypanophobia or let's transfer that to needle phobia.

13 Q Would you explain in detail to us Chris' trypanophobia?  
14 First of all, how did you confirm the diagnosis of  
15 trypanophobia with Chris?

16 A Several ways.

17 Q What did you do?

18 A Several ways. The psychodiagnostic testing helps us do  
19 that. Also the assessment and the history. And I also used  
20 a technique called exposure which I gave him no forewarning,  
21 I produced a 27-and-a-half gauge syringe or what's called an  
22 insulin syringe, same size syringe that we use or are used to  
23 give flu shots. I pulled it out of the drawer --

24 Q Let me stop you for those who might not look at the  
25 needle that they use for the flu shots. Is it a small one,

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1 large one?

2 A It's about this big (indicating). It's got a thin  
3 barrel where the fluid is lodged and then the needle actually  
4 is about the size of a large sewing thread needle.

5 Q So when you say this large, you're talking about the  
6 whole syringe?

7 A Syringe. Plunger, barrel and needle about this big  
8 (indicating).

9 Q Needle itself, can you give us --

10 A About that long (indicating). It's not injecting a  
11 whole lot of fluid. Usually insulin or flu vaccine. So I  
12 produced it, laid it on a desk and I watched the reaction.  
13 Okay. Unprepared. Unprepared. Spontaneous. And typically  
14 it's spontaneous reactions that people can't rehearse. So he  
15 got white and looked and I took the cap off the syringe and I  
16 said I want to show this to you and he looked at it and he  
17 didn't like looking at it and then I took it and I drew the  
18 edge of the needle to my skin and I punctured the skin on top  
19 of my hand until it bled and I thought he was going to faint.  
20 He got white and did not do well at all, turned his head and  
21 was a little annoyed with me and rightly so because when we  
22 treat people we don't do that. We don't surprise them but  
23 this was an assessment. So I was looking for that  
24 spontaneity and after treating people for 30 years I can tell  
25 when they're pretty much, when they're putting on a show and

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1 they're not. They just have that spontaneous sick look to  
2 them and they turn white, very uncomfortable and so I asked  
3 him about how he felt. He said I don't like looking at that  
4 at all, why didn't you tell me that? Well, I want to see  
5 your reaction. I pulled it out and I wiped off the blood. I  
6 literally let him look at the blood. We discussed it, we  
7 talked about how he felt seeing the blood, how he felt about  
8 the needle without puncture, how he felt when he saw the  
9 puncture, so forth. That's one measure that I used to  
10 assess. In addition to the history that I took with regard  
11 to his experiences with needles.

12 Q Can you tell us about that.

13 A Sure. When he was very young, about eight years old,  
14 he developed an illness and the family physician suspected it  
15 might have been meningitis. So he went to the hospital and  
16 one of the tests for meningitis is a spinal tap in which they  
17 inject a needle in the spine and, in fact, I had the  
18 wonderful pleasure of having that experience one time which  
19 is horrible and they draw out cerebral spinal fluid to  
20 measure the level of proteins. That tells them whether or  
21 not the person has meningitis or not. So he was threatened  
22 with the possibility of having this done. Apparently they  
23 told him that they were going to do this but then they didn't  
24 because they ruled out he had meningitis. That was very  
25 nerve racking for him. He didn't care for that at all. It

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1 was a bad experience and he recalls that he had a lot of  
2 heightened anxiety about getting any kind of injection.

3           It was subsequent to that period that he had to  
4 undergo a few inoculative injections. He doesn't remember  
5 receiving any Novocaine at the dentist but he does remember  
6 not liking the experience at all with needles and having a  
7 great deal of difficulty with them. Then at age 18 he  
8 dropped a large item on his foot in the pharmacy. He injured  
9 his toe. So when he went to the emergency room, they looked  
10 at it, without warning pulled out a needle and stuck him in  
11 the foot which really sent him through the roof because it  
12 was really painful and a large needle and he -- I think that  
13 worsened his anxiety at that point. And he yelled loudly and  
14 then he had to receive his tetanus shot at one point. This  
15 was also a very negative experience and he had a great deal  
16 of difficulty with it to the point where he can't even use a  
17 needle to get a splinter out. He just does not like any  
18 puncturing of the skin at all. So, of course, when he got  
19 married he had to give blood and that was a nightmare. He  
20 had a hard time giving blood but it seems that the stick of a  
21 draw of blood was a little easier than the jab of an  
22 injection and certainly watching it and looking at it is very  
23 difficult for him, which is most people that can have any  
24 fear of needles turn their head, wait for the stick and then  
25 not look at it. Seems to be more painful when you watch



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1 piercing their skin and draw. So that contributed to his  
2 absolute disdain for any kind of needles and punctures and he  
3 avoided it as much as he could.

4 Q Can you tell us, first, how this affects Chris with  
5 respect to receiving injections and then how it would  
6 affect -- do you have an opinion with respect to how it would  
7 affect him giving injections?

8 A All right. Well, anyone who receives an injection and  
9 most of us have, you're on the receiving end, so there's no  
10 performance involved other than just lying there.

11 Q Let me interrupt because I want to make sure it's  
12 clear. When I'm asking for your opinion, I'm asking within a  
13 reasonable degree of professional certainty.

14 A Yes. That's correct. It's not -- there's no  
15 performance involved. There's submitting and bearing it,  
16 hurrying it, getting it over as quick as possible. So he has  
17 been able to tolerate that when absolutely necessary.  
18 Doesn't like it, tries to avoid it but when he has to he gets  
19 it. Creates a lot of anxiety for him so he's better off,  
20 like most people that are needle phobics, when they don't  
21 know it's coming, it hits them, then it's over. But when  
22 you're performing it's different because you can't look  
23 away. You can't cognitively avoid and when I say cognitive,  
24 think about being somewhere else or something pleasant. You  
25 have to focus on what you're doing and you have to watch the

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1 stick. So you have to watch the skin being pierced and  
2 inevitably you have to watch some blood, wipe it usually with  
3 an alcohol pad or, you know, sterile solution, put a BandAid  
4 over it. So there's a lot to do with Mr. Stevens' issues. A  
5 big problem is lightheadedness and fainting. Becoming faint,  
6 even when he's seated, there's trouble with that. His  
7 concern was how am I going to perform this function  
8 repeatedly when I have to watch it, look at it and I'm not --  
9 I can't guarantee I'm not going to drop over. You know,  
10 there's lots of concerns with somebody potentially fainting  
11 when they give an injection. I don't want anybody fainting  
12 when they give me an injection. I don't want the needle to  
13 break off in my arm or to drag and cause a laceration or --  
14 you want it done competently. So this was his concern and he  
15 really just did not believe that he could do this at all. He  
16 knew his anxiety was too high and so --

17 Q Let me ask you a question: Within a reasonable degree  
18 of professional certainty, was he right?

19 A Absolutely. Absolutely. I mean in his condition?

20 Q Yes.

21 A In my professional opinion he should not be performing  
22 a function when his anxiety is so high it will interfere with  
23 that ability and to do it correctly because we're talking  
24 about a human being. We're not talking about picking a stick  
25 of -- piece of meat or wood. We are talking about a human

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1 being. He has to remain vigilant in the event that there's a  
2 negative reaction. Anaphylaxis, which is what sometimes  
3 individual can experience after they get an injection. If  
4 he's not in a position to be able to function, then you know  
5 that's a major concern. So I don't think antically he felt  
6 as well as physically able to do that.

7 Q Doctor, would the effect of giving an injection given  
8 his current condition affect his ability to concentrate for  
9 any period of time after?

10 A Sure.

11 Q Tell us about that.

12 A Well, when anxiety raises to that level -- everybody's  
13 experienced some anxiety at one time or another. You're  
14 hypervigilant. Your blood pressure goes up. You're not  
15 always focused on what you should be doing because you're a  
16 little bit beside yourself. So to go back and then  
17 concentrate on other duties such as filling a script or  
18 checking synergistic effects of medication --

19 Q When you say synergistic?

20 A S-Y-N.

21 Q Are you taking about interactions?

22 A My understanding, pharmacists have to be concerned  
23 about whether people are not getting medications, two at a  
24 time that are going to cause problems and sometimes  
25 physicians are prescribing, experts miss that so they need to

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1 be vigilant about that. And I treated a number of  
2 pharmacists who have explained that to me. So, he has  
3 certain concerns about being able to function after that and  
4 that was his -- that was his worry.

5 Q How does this type of condition develop?

6 A Usually individuals will have a bad experience early in  
7 their life. You know, you typically are not afraid of dogs  
8 other than their bark or growl but if you've been bitten or  
9 you've been mauled or close to, your anxiety goes very high  
10 and you have more of a trauma so you may develop more of a  
11 phobia or you may have had experience with heights, so on so  
12 forth. So most develop because it was a negative experience.  
13 It hurt. It stung. Over and above. I haven't met anybody  
14 in my 35 years who was ecstatic about getting needles. Even  
15 drug addicts don't like puncturing themselves but they do  
16 because they have to. So usually there's a trauma but  
17 sometimes avoiding it because of the anticipated fear creates  
18 sort of a vacuum because then, when they eventually have to,  
19 it's become such an avoided issue that anxiety goes up even  
20 higher.

21 So if you've been like phobic of water or heights  
22 and you've managed to avoid that pretty much and then you  
23 have to do it, it becomes worse. So it compounds over time  
24 and he's had a number of experiences where it was just  
25 painful. There was a loss of control meaning he had to

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1 subject to it. It sort of works in harmony with his  
2 obsessive compulsive nature. I don't like being out of  
3 control. They like controlling their environment. So this  
4 raised the level for him and in two particular areas are  
5 heights and needles. There maybe other areas that he was  
6 never exposed to that he could be phobic of but these are the  
7 ones we know of.

8 Q In Chris' case with the symptoms, can you describe what  
9 symptoms are produced by the trypanophobia?

10 A Lightheadedness, syncope, S-Y-N-C-O-P-E, fainting  
11 aspect of light headedness. I'm going to tell you a minute  
12 ago I said your anxiety goes up but sometimes there's a  
13 vasovagal effect where the blood pressure drops rapidly and  
14 you get lightheadedness and dizzy and that often happens with  
15 blood and injections.

16 Q So it happens with Chris?

17 A Yes. I watched him almost keel over when he was  
18 sitting when I produced the needle. Very uncomfortable.  
19 They may have increased breathing, respiration and sometimes  
20 sweating.

21 Q Does it have an effect on his neurological functions?

22 A Yes, because it's --

23 Q Explain to us why and how.

24 A Without getting too technical, it's the sympathetic  
25 nervous system, sympathetic branch of the nervous system

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1    which increases our heart rate, respiration, involuntary  
2    functions.  When that is triggered, it's a neurological  
3    reaction, okay, because we have that overdrive.  And then  
4    what shuts down those symptoms is called the parasympathetic  
5    branch but the problem is that works much, much slower than  
6    the sympathetic branch, so sometimes it takes a lot longer  
7    for the symptoms to subside.  You don't want to have them.  
8    That's why most people avoid the thing they're phobic about.  
9    They don't want to have anxiety reaction because it doesn't  
10   go away right away.  Lingers for a while.

11   Q     Does it affect brain function?

12   A     Well, the neurochemical disposition in the brain which  
13   has to affect those areas in the nervous system are also off  
14   so you may have some, you know, negative reactions.  A lot of  
15   the jitteriness, a lot of uncomfortable feelings.  Edgy.

16   Q     Do you have any doubt that Chris suffers from  
17   trypanophobia?

18   A     No.  Let me tell you, if I did, I would have never -- I  
19   wouldn't be here.  Okay.  I have had people who said they had  
20   certain anxieties and they were making it up.  Okay.  This is  
21   not one of those cases.  This guy has it.

22   Q     Does -- strike that.  What affect does it have on his  
23   ability to work?

24   A     Well, in this particular situation, I don't believe  
25   that he would have been able to effectively function in

Dr. Dattilio - Direct

1 providing injections for patients and I also have grave  
2 concern about the state he would be if forced to do so  
3 afterwards in filling scripts and taking care of his duties  
4 as a pharmacist.

5 Q Are there other types of jobs he'd be unable to do?

6 A I couldn't imagine him being a phlebotomist, drawing  
7 blood all the time or, you know -- in fact, he didn't even  
8 like looking at the needles in the pharmacy. He didn't have  
9 to touch them, they were packaged, but he didn't like looking  
10 at them. Anything that would have to do with any puncture,  
11 infusion, stick. I'd never ask him to take a splinter out of  
12 my finger either because he probably wouldn't do a very good  
13 job and wouldn't do it. There's some things that in the  
14 medical field would be a problem for him.

15 Q Is the condition treatable?

16 A Absolutely.

17 Q Tell us about the treatment.

18 A About 20 to 23 percent of the world's population or the  
19 United States population has needle phobias. People don't  
20 advertise it, but probably not many who do.

21 Q Let me ask you a question: There's a scale, is there  
22 not; in other words, some people have worse than others?

23 A Yes. Some people have severe, some people have it -- I  
24 mean I get them. I don't love them but I get them.

25 Q Where does Chris fall on the spectrum?

Dr. Dattilio - Direct

1 A He's at the high end. He's, you know, 80 percent  
2 range, 89 percent range. The only step worse is the people  
3 who literally die because they refuse to be stuck. That's,  
4 that's blatant but so, you know, getting -- some people have  
5 problems, they'll take it in the arm but they don't like it  
6 in the mouth. The dentist has to do that. I had somebody  
7 that had to have an injection in his eye and had real  
8 problems after that. Understandably so. So there's  
9 different ranges. About 20 to 23 percent of the population  
10 have it. Unfortunately, the majority of those people never  
11 get treated because they don't have. They can successfully  
12 avoid it. They don't go near needles when they're phobic,  
13 they stay away from them. If you can do it successfully,  
14 they do. But in this particular case, yeah, we have a range  
15 of severity. So there's mild, moderate, severe. And it's  
16 very treatable. If people are willing to submit and get  
17 treatment, it can go anywhere from three to five sessions to  
18 be done in a couple of months. Depends on the experience.

19 Q Now, not all treatment is successful, would that be  
20 fair to say?

21 A No. No.

22 Q After examining Chris do you have an opinion with  
23 respect to whether or not Chris would tend to be resistant  
24 to, first, to the idea of treatment?

25 A Well, I think he would be appropriately anxious about



Dr. Dattilio - Direct

1 it, as most people are, and I think because there's  
2 performance involved, it would be more difficult for him.  
3 Remember, we're not just talking about treating him to be  
4 able to go to the dentist or to have blood drawn or have  
5 something done. I mean, we're talking about an obsessive  
6 compulsive type of person who's very conscience about  
7 everything he does. So if he's going to give injections, he  
8 wants to do them right, do them stably, in a stable fashion  
9 and he wants to be able to enjoy what he's doing and feel  
10 like he's helping people. So I think that would create --  
11 but I think if someone sits with him, works with him and  
12 says, look, it's not as bad as you think, we can desensitize,  
13 reduce. I think he's willing to do that. He's a pleaser.  
14 He likes making people happy. He's been doing that in his  
15 job for decades.

16 Q Would the treatment be more complicated for someone to  
17 get to the point where they could administer injections than  
18 it would be to get them to the point where they could receive  
19 injections?

20 A Absolutely. Yes.

21 Q Most of your experience with treatment is with respect  
22 to the people who are being treated so that they can receive  
23 injections, is that correct?

24 A Yes.

25 Q That's the majority of the statistics?

Dr. Dattilio - Direct

1 A Although I have had people that went into the medical  
2 field, believe it or not, and had anxiety about needles.  
3 Didn't think it would be that bad when they came to their  
4 level of work as a nurse or as a physician where they had to  
5 start giving them, and the physicians can always dump it on  
6 the nurses so they can get away with it. Particularly it's  
7 more so with nurses who are physician assistants, then they  
8 say I'm having more anxiety about this than I thought. Now  
9 I'm worried I'm going to break a needle or have to do this  
10 again or it's a bad stick. So there's a performance anxiety  
11 component to doing it as opposed to just, let's face it, if  
12 you have to stick, you got to grit your teeth, not look,  
13 hurry, shoot, get it over with and it's done.

14 Q That's in the case where people don't have a fear  
15 themselves of getting needles?

16 A Correct.

17 Q So they're starting in a different place than Chris  
18 would be starting?

19 A Absolutely.

20 Q Let me ask you this: Do you recognize this book? I'm  
21 holding it up.

22 A I see it in my sleep. It's called Diagnostic  
23 Statistical Manual of Mental Disorders.

24 Q What is that?

25 A It's our Bible. It's like a physician's desk reference

Dr. Dattilio - Direct

1 as to the physician or the Merrick, M-E-R-R-I-C-K manual for  
2 physicians. It gives you all of the diagnostic nomenclature.  
3 All diagnoses that are constituted by the spectrum of mental  
4 illness.

5 Q Is that a copy you're holding up in your hand?

6 A It's a pocket copy. It's that thing condensed here so  
7 we can stick it in our pockets when we go to the hospital.

8 Q Given the amount of gray hair, are you actually able to  
9 read that?

10 A I have --

11 THE COURT: I think it's time to take a break.

12 MR. BERMAN: Thank you, your Honor.

13 (Short break taken)

14 (Jury present)

15 THE COURT: Okay, Mr. Berman, you may continue.

16 MR. BERMAN: Thank you, your Honor.

17 BY MR. BERMAN:

18 Q Are the conditions you diagnosed of Mr. Stevens found  
19 in the DMS-5?

20 A Yes, they are.

21 Q Both trypanophobia and OCD?

22 A Yes.

23 Q Can you explain to us how the OCD and the trypanophobia  
24 are related?

25 A Okay. Well they're both anxiety disorders.

Dr. Dattilio - Direct

1 Q And I'm talking about in Mr. Stevens' case, not in  
2 general.

3 A But because they're both governed off of anxiety, the  
4 OCD is sort of the fulcrum or the housing that sets the tone  
5 for phobias developing and so particular experiences that one  
6 may have during their life time, particularly issues that  
7 involve being out of control or a loss of autonomy, that  
8 becomes the foreground for the anxiety to develop in terms of  
9 a simple phobia. Could be a specific phobia. Could be  
10 social phobia.

11 Q And in Mr. Stevens' case?

12 A In this particular case the OCD, the obsessive  
13 compulsive was there and what it generated as a result is  
14 specific phobias, namely heights and the needle phobia, some  
15 blood and there's also a little social phobia with him too I  
16 noticed but I didn't make that diagnosis but some of it's a  
17 fear, a little bit of the generalized fear of making a fool  
18 of himself in public. I think it's probably related to, you  
19 know, what happens if I don't do well with his performance  
20 and then I feel bad for the patient because his patients are  
21 very important to him.

22 MR. BERMAN: I have nothing else. Thank you.

23 THE COURT: Thank you Mr. Berman.

24 MR. RAVEN: Thank you, your Honor.

25

Dr. Dattilio - Cross

1 CROSS-EXAMINATION

2 BY MR. RAVEN:

3 Q Good morning, Doctor.

4 A Good morning.

5 Q Doctor, I just want to pick up on something. You said  
6 you made a diagnosis of OCD, correct?

7 A Yes.

8 Q You're aware that there's no claim in this case that he  
9 ever told his employer or was diagnosed with OCD before he  
10 was terminated? You understand that, correct?

11 A That's correct.

12 Q So there's no claim in this case for that whatsoever?

13 A That's correct.

14 Q Doctor, you can have OCD without having trypanophobia,  
15 correct?

16 A Absolutely.

17 Q The only claim in this case is that Mr. Stevens says he  
18 has trypanophobia?

19 A Yes.

20 Q And that prevented him from giving injections or  
21 immunizations through his employment, correct?

22 A That's correct.

23 Q All right. Now, Doctor, you exposed Mr. Stevens to a  
24 syringe and needle, correct?

25 A Yes.

Dr. Dattilio - Cross

1 Q And you said that you did it without telling him that  
2 you were going to do it?

3 A Right.

4 Q Before you injected yourself, did you tell him you were  
5 going to do it?

6 A Yes.

7 Q All right. And did you, at the time that you performed  
8 those tests, have Mr. Stevens hooked up on any type of  
9 monitors to measure his blood pressure?

10 A No.

11 Q Did you have any type of instruments or measurements of  
12 his pulse?

13 A No.

14 Q Would it be fair to say that when you performed the  
15 tests, you were just observing Mr. Stevens, correct?

16 A Eyeball, right.

17 Q And you were basing your opinion on complaints or  
18 anything he said to you, correct?

19 A Based, based on complaints. I based on my observations  
20 of his nonverbal behavior and what I observed commensurate  
21 with the people that I've treated of phobias over the years.  
22 So I relied on my credible judgment.

23 Q Would it be fair to say you were basing it upon the  
24 subjective complaints of Mr. Stevens as opposed to objective  
25 tests such as, I think what you talked about before, somebody

Dr. Dattilio - Cross

1 comes into an emergency room and says, oh, I fell and my leg  
2 hurts. They have to take an X-ray or an MRI or CAT scan,  
3 those would be objective tests?

4 A Right. The only objective test were the techniques  
5 that were used. I employed a personality inventory anxiety  
6 measure and there was another one for that I used to  
7 determine his blood injection symptom scale.

8 Q That was for the OCD, correct?

9 A That was for that and the trypanophobia.

10 Q When you did the test for taking the syringe out and so  
11 forth, you did not have him hooked up to any equipment that  
12 would give you an objective finding, correct?

13 A Bio feedback, monitor for pulsation or heart rate, no.

14 Q Now, Doctor, I want to skip ahead, going to be pretty  
15 brief here.

16 A Sure.

17 Q You are of the opinion with a degree of certainty in  
18 your field --

19 A Psychological.

20 Q -- in psychology, that Mr. Stevens' condition is  
21 treatable, correct?

22 A Yes.

23 Q All right. As a matter of fact you issued a report in  
24 March of 2014, correct?

25 A Yes.

Dr. Dattilio - Cross

1 Q And, Doctor, you are of the opinion in March of 2014  
2 that Mr. Stevens could undergo desensitization behavioral  
3 modification training?

4 A Systematic desensitization, correct.

5 Q And that there was a 90 percent chance that he could be  
6 cured of his trypanophobia, is that correct?

7 A Yes.

8 Q All right. And, Doctor, in your report, in fact on the  
9 last page, on page 16 you indicated that Mr. Stevens could  
10 even be treat -- would be cured or treated with as little as  
11 one therapy session, correct?

12 A Well, what I indicated was that there are treatments,  
13 exposure sessions that are as little as one. Whether or not  
14 he would respond to one would have to remain to be seen but  
15 he could possibly.

16 Q And, Doctor, you also indicated that the treatment is  
17 affordable and would not require long-term therapy, is that  
18 correct?

19 A That's correct. It's typically the type of treatment  
20 that does not require long-term therapy or it can be done  
21 without medication, as well.

22 Q Mr. Stevens has testified that he's made an appointment  
23 with someone as of now for an initial visit and it would take  
24 14 to 15 visits to help him and each one of those visits  
25 would be \$340. You don't indicate that in your report,



Dr. Dattilio - Cross

1 correct?

2 A No.

3 Q Okay. As a matter of fact, even as you just told this  
4 jury, he could possibly be treated in just one visit?

5 A Right. It's the type of treatment that you get.

6 Q By the way, in your report you did not differentiate  
7 between Mr. Stevens receiving injections and Mr. Stevens  
8 giving injections, correct? You didn't make that  
9 distinction, did you?

10 A With regard to the level of anxiety?

11 Q Well, in terms of level of anxiety and more importantly  
12 in terms of his treatment.

13 A Yes. That's correct.

14 Q Okay. So there's nothing in your report that would  
15 tell us, you know, give us a different percentage chance of  
16 him being able to give immunizations as opposed to just  
17 getting an injection?

18 A Correct.

19 Q And, again, it would be the treatment you said is  
20 affordable, correct?

21 A Yes. Often times it's covered by medical insurance.

22 Q But assuming it's not. It's still affordable; it's not  
23 something that's outrageous?

24 A I guess that's a relative term.

25 Q I agree.

Dr. Dattilio - Cross

1 A The cost runs anywhere from 150 to 200, maybe to 250  
2 and that's a cognitive behavioral therapist. If it's an  
3 analytic-style therapist who typically take longer, the type  
4 of treatment they use, maybe 150 to 300 depending on where  
5 you're at.

6 Q Dr. Dattilio, did you, after you examined Mr. Stevens,  
7 did you ever offer to treat him?

8 A I can't. No, I didn't. I can't. Ethically I'm not  
9 allowed to treat if I'm assessing someone in a separate  
10 matter.

11 Q Did you recommend him to perhaps one of your  
12 colleagues?

13 A No, because my involvement was just to assess. Not to  
14 make any treatment recommendations forward.

15 Q So your involvement in this case was because it was  
16 litigation, correct?

17 A That's correct.

18 Q And you were retained by these attorneys to evaluate  
19 Mr. Stevens in the context of his lawsuit, correct?

20 A That's correct.

21 Q Now, prior to your seeing Mr. Stevens, are you aware of  
22 anyone who -- let me ask you this: Prior to your treatment  
23 or your evaluation of Mr. Stevens, was there available  
24 treatment for trypanophobia?

25 A You mean his immediate vicinity or environment or

Dr. Dattilio - Cross

1 anywhere?

2 Q Was there treatment for it, period.

3 A Absolutely.

4 Q How long has that treatment existed?

5 A Forty, fifty years.

6 Q Okay. And if one were to do research, perhaps even  
7 just Google it or go on the internet for treatment for needle  
8 phobia, is that something that's pretty accessible in terms  
9 of finding?

10 MR. BERMAN: I'm going to object, your Honor.

11 THE COURT: Why?

12 MR. BERMAN: Speculative as to what one Googling  
13 would be.

14 THE COURT: You don't know what the Google would  
15 turn up until you Google but people who use computers go into  
16 Google, have a certain level of anticipation what they can do  
17 when they're using that device. I think this doctor can tell  
18 us based on any experience he's had in using a computer what  
19 he would expect to find.

20 A Well, I can tell you that I have Googled to look for  
21 people in different areas because I'm well-known. I get  
22 e-mails, I'm looking for a therapist to treat my anxiety in  
23 Milwaukee, Wisconsin. I can go on ListServ or Google and  
24 find, I recognize people's names, I'll refer them, so they're  
25 all over.

Dr. Dattilio - Cross

1 Q Okay. All right. So would it be fair to say that the  
2 treatment was available and that it could fairly easily be  
3 found if one wanted to do that?

4 A Absolutely. I mean this is Albany. David Barlow who  
5 is one of the gurus in anxiety disorder treatment was at the  
6 University of Albany. They're all over the place in this  
7 area.

8 Q That's not too far from where Mr. Stevens lives,  
9 correct?

10 A Correct. Not at all.

11 Q Do you know whether when Mr. Stevens made an  
12 appointment to go for the initial evaluation?

13 A With?

14 Q With whoever he's going to go to now.

15 A Not at all.

16 Q Do you know if he's gone for the evaluation?

17 A I haven't spoken to him since the last time I assessed  
18 him. I said good morning to him this morning.

19 Q You haven't seen him since you evaluated him?

20 A Not at all.

21 Q When you took the needle out and you said you didn't  
22 tell him, okay, you did tell him that you were going to  
23 inject yourself, correct?

24 A Yes.

25 Q Did Mr. Stevens ask to leave the room?

Dr. Dattilio - Cross

1 A He said I don't know if I can watch it and I said I  
2 want you to be present when I do it and he was very  
3 uncomfortable and I did it quickly and drew blood.

4 Q But he didn't ask to leave the room, correct?

5 A No.

6 Q All right. Now, and he didn't faint?

7 A Almost.

8 Q Okay. But he didn't faint?

9 A He didn't faint. He was sitting.

10 Q Now, do you have any information or have you been given  
11 any information as to whether Mr. Stevens was offered some  
12 classes and offered training through his Rite Aid employer in  
13 administering immunizations?

14 A I believe I read something somewhere in the literature  
15 that said that. I don't remember correctly but I think I saw  
16 something somewhere that or he said it about, that he would  
17 be trained to do that.

18 Q Do you have any information as you sit here now after  
19 you've evaluated this case as to what that training was and  
20 what the classes encompassed?

21 A No.

22 Q Do you know whether those classes included pharmacists  
23 who were resistant or did not want to use needles?

24 A No.

25 Q Okay. And, Doctor, that would be something important

Dr. Dattilio - Cross

1 to know when evaluating this case in terms of whether  
2 Mr. Stevens, had he gone through the classes, would have been  
3 able to immunize and go through the program --

4 MR. BERMAN: That's beyond the scope.

5 Q -- correct?

6 MR. BERMAN: That's beyond the scope of the  
7 witness' testimony of what would have happened had he gone to  
8 classes to which he knows nothing.

9 MR. RAVEN: Just testing his knowledge.

10 THE COURT: Well, I think that's right. There's  
11 been no testimony that I heard any way about what those  
12 classes would consist of as to how they were conducted, would  
13 be conducted, who would conduct them, what would be the  
14 material of those classes and for the doctor to have to make  
15 a guess as to whether or not going to classes he knows  
16 nothing, nothing about would help the plaintiff is probably  
17 not an appropriate question. So your objection is sustained.

18 BY MR. RAVEN:

19 Q Did you ask for any information as to what the classes  
20 encompassed?

21 A No.

22 Q Did you observe at any time Mr. Stevens receiving an  
23 injection?

24 A No.

25 Q Did you ask him if he could inject in front of you?

Dr. Dattilio - Redirect

1 A I'm sorry?

2 Q Sure. Did you ask him whether he would be willing to  
3 inject in front of you?

4 A No, I didn't ask him that.

5 Q Did you ask him to hold the needle and syringe?

6 A Yes.

7 Q Did he?

8 A No.

9 Q In August of 2011 when Mr. Stevens was terminated from  
10 his employment I think the answer would be the same, there  
11 was treatment available for him to become an immunizer, is  
12 that correct?

13 A Yes.

14 MR. RAVEN: Thank you. I have nothing further.

15 THE COURT: Redirect?

16 MR. BERMAN: Just a couple, your Honor.

17 REDIRECT EXAMINATION

18 BY MR. BERMAN:

19 Q Just to be -- just to be clear, Mr. Raven asked you  
20 when you made your observations of Mr. Stevens' reaction to  
21 the needle you didn't have him hooked up to any machines but  
22 you did make observations of him physically, did you not?

23 A Correct.

24 Q And were those objective observations? Did you find  
25 objective signs that you saw?

Dr. Dattilio - Redirect

1 A Yes. And they're based off of my years of experience  
2 working with individuals in treatment anticipating or trying  
3 to forecast whether they were going to lose consciousness or  
4 they're going to get shocky. I know what the prelude is.  
5 He certainly had that response. So, no, I'm sure if I had  
6 hooked him up, that may have given us vital data but I felt  
7 that what I saw was sufficient based on my experience.

8 Q When you mentioned to Mr. Raven the cost of 150 to  
9 \$300, that was per hour per session, was it not?

10 A Per hour per session depends on where you live. Go to  
11 Manhattan, you're talking about \$300 an hour. If you go, you  
12 know, you go down south somewhere, it's a different story.  
13 Upstate New York it may be less but generally the reasonable  
14 and customary charge, if you will, is between 150 to \$200 per  
15 session for that.

16 Q Per session but not for the whole treatment?

17 A No. That's right.

18 Q In terms of the Google searches, when you were asked  
19 about the Google searches you referred to a search you might  
20 make?

21 A Well, I have access to ListSrvs, so American Disorder,  
22 American Associate of Anxiety Disorders. The Association for  
23 Cognitive Behavior Therapy. We have ListSrvs so we can go  
24 on there and say, hey, look, I have a patient who has needle  
25 phobia, he lives in Utica, New York, any referrals of, you



Dr. Dattilio - Redirect

1 know, seasoned therapists for completing simple phobia  
2 injections. That's when you get names, I'm in that area,  
3 I'll be happy to take them.

4 Q When you do a computer search you use ListServ because  
5 its provides you with reliable sources, is that right?

6 A Some of whom I may even know.

7 Q Have you ever Googled anything? Have you ever used  
8 Google, not a search for that, have you ever used Google?

9 A Yes. Restaurants and stuff like that, sure.

10 Q Was it your experience that Google always gives you  
11 reliable information?

12 A No. Sometimes it's like a wild goose chase. Sometimes  
13 it's good but sometimes it's not so good.

14 Q When you met with Chris, was that the first time that  
15 he learned that treatment was available?

16 A Yes.

17 Q Do you know if Rite Aid offered him treatment?

18 A No. I think I answered that specific question.

19 Q And what was the answer?

20 A No treatment was offered. He was just told you have to  
21 do it.

22 MR. BERMAN: I have nothing further.

23 THE COURT: Mr. Raven?  
24  
25

Dr. Dattilio - Recross

1 RECROSS-EXAMINATION

2 BY MR. RAVEN:

3 Q Dr. Dattilio, but again you don't know anything about  
4 the classes that were being offered?

5 A No.

6 Q Okay. So you don't know what the trainers would have  
7 done?

8 A No, not at all.

9 Q Okay. And do you know if in your conversations with  
10 Mr. Stevens whether he had ever inquired as to what the  
11 classes entailed and what they could have done?

12 A No.

13 Q Are you aware that Dr. Warfel, his treating physician  
14 for over two decades, has said that it would not be harmful  
15 for him to attend the classes at Rite Aid. Are you aware of  
16 that?

17 A I don't remember seeing anything like that, no.

18 Q You reviewed Dr. Warfel's records --

19 A Yes.

20 Q -- correct?

21 MR. RAVEN: Could we have Defendant's Exhibit 12,  
22 please?

23 MR. BERMAN: Your Honor, I've got to object to  
24 this. This is beyond scope of the recross. The recross was  
25 on treatment, not on training and not on whether it would be

Dr. Dattilio - Recross

1 harmful for him to attend training.

2 THE COURT: That's right. I'll sustain that.

3 Q Did you ever meet Dr. Warfel other than here?

4 A Just this morning, no.

5 Q When you evaluated the patient, did you ever call  
6 Dr. Warfel?

7 A No. I had records so....

8 Q But you did review his records, correct?

9 A Yes.

10 Q You're aware -- are you aware that Dr. Warfel said he  
11 could go to the classes?

12 A You know, I've read the records. I don't remember  
13 seeing that but I'll take your word for it it exists. I can  
14 go back in the record and see it.

15 Q Is there a difference between going to the classes and  
16 actually doing an injection?

17 A Sure.

18 MR. RAVEN: Thank you very much. Nothing further.

19 MR. BERMAN: Nothing, your Honor. Thank you.

20 THE COURT: Thank you, Dr. Dattilio. You may step  
21 down, sir.

22 (Witness excused)

23 THE COURT: Okay, Mr. Berman, what do you got?

24 MR. BERMAN: I'm going to switch seats with  
25 Mr. Whitaker at this point, your Honor, and give everybody a

Dr. Dattilio - Recross

1 break from hearing my tones.

2 MR. WHITAKER: Judge, our next witness is Karen  
3 Simone.

4 THE CLERK: Would you state your name for the  
5 record, please.

6 THE WITNESS: Karen Simone.  
7  
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25

Karen Simone - Direct

1 K A R E N S I M O N E, having been called as a witness,  
2 being duly sworn, testified as follows:

3 THE COURT: Okay. Proceed.

4 BY MR. WHITAKER:

5 Q Good afternoon, Miss Simone.

6 A Good afternoon.

7 Q First I want to thank you for coming out. I know it's  
8 a day early. Would you please introduce yourself to the  
9 jury, giving your full name and tell them where you live and  
10 work?

11 A Sure. Karen Simone and I live and work in Syracuse,  
12 New York.

13 Q And what is your profession?

14 A My profession is vocational rehabilitation counseling  
15 and also lifecare planning which is part of rehabilitation.

16 Q And where are you currently employed?

17 A I'm currently self-employed, K. Simone and Associates.

18 Q Just backup for a moment. Can you briefly explain for  
19 the jury, you mentioned the two areas of your profession,  
20 vocational rehabilitation and lifecare planning. Can you  
21 just explain for the jury what those two things are and the  
22 difference between them?

23 A Sure. So, vocational rehabilitation counseling is  
24 working with people with disabilities to help them overcome  
25 limitations and barriers to hopefully be able to return to

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1 work or get a job in the labor market and if that's not  
2 possible, then to help them be as independent as possible.  
3 And lifecare planning is sort of a subset of vocational  
4 rehabilitation or rehabilitation, in general, in that it's  
5 understanding the medical and diagnoses and treatments  
6 associated with certain conditions and how frequently they  
7 need to occur to prevent decompensation and how much those  
8 things cost.

9 Q Can you just give the jury a background of your  
10 education, give them your educational background, please?

11 A Sure. I have a bachelor's degree from SUNY Oswego in  
12 public justice and then I attended graduate school at  
13 Syracuse University and rehabilitation counseling and then I  
14 also have a post graduate certification in lifecare planning  
15 from the University of Florida.

16 Q And, Miss Simone, can you please explain for the jury  
17 what your work experience has been since you completed  
18 graduate school?

19 A Sure. I started working while I was in graduate school  
20 and I started working in private rehabilitation, helping  
21 injured workers return to work or working with their  
22 employers to make job accommodations and modifications so  
23 they could stay at work or go back to work. I did  
24 employability assessments to determine what their skills were  
25 and also labor market research to understand what the

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1 viability of their options were in the labor market. I then  
2 went to work inpatient for something different at Upstate  
3 University Hospital in Syracuse and I worked on the rehab  
4 floor with some pretty severe injuries. I also worked on the  
5 psychiatric inpatient unit helping them understand what their  
6 vocational options were when they recovered from disability.  
7 I then went to work for Met Life Disability Insurance Company  
8 where I worked with a very large employer. I partnered with  
9 them to help their employees return to work that were on  
10 disability claim. So I would work with the supervisors to  
11 suggest job accommodations, modifications, work with the  
12 doctors to make sure it was safe, then I was promoted into  
13 management. Managed the clinical staff and then I got the  
14 job of managing their appeals department and then I left and  
15 went to work with Dr. Ken Reagles in Syracuse who does expert  
16 witness testimony, as well as he sort of mentored me and took  
17 me under his wing and now I'm self-employed and do the same  
18 type of work.

19 Q So, just to summarize all told, how many years of  
20 experience do you have in vocational rehabilitation?

21 A Started in 1992. So several decades.

22 Q Miss Simone, you mentioned earlier, I believe a  
23 certification you have. Make sure I don't miss it, can you  
24 explain to the jury any professional certifications that you  
25 hold?

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1 A Sure. I'm a certified rehabilitation counselor and  
2 that requires a person to, these days, have a Master's degree  
3 in rehabilitation. And I'm also a certified lifecare planner  
4 and that requires the post-graduate work where you get  
5 specifically trained, 120 hours minimum, for lifecare  
6 planning.

7 Q And are you a member of any professional organizations  
8 related to your field of practice?

9 A Yes. I'm a member of the International Association of  
10 Rehabilitation Professionals and it's -- they also have state  
11 chapters. I also belong to the New York State chapter.

12 Q Do you have any leadership roles within your field of  
13 specialty?

14 A Yes. I'm currently president of the New York Chapter  
15 of Higher Ups.

16 Q Have you ever conducted any seminars or lectures in the  
17 field of vocational rehabilitation?

18 A Yes. Together with Dr. Reagles, every year we  
19 co-present an advanced law class at Syracuse University. He  
20 sort of takes the economic loss and I take the lifecare  
21 planning piece to introduce law students to the consent of  
22 lifecare planning.

23 Q Can you just provide a little bit more detail. You  
24 mentioned the term economic loss, can you explain briefly for  
25 the jury a little more specifically about what you were



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1 speaking on at the Syracuse School of Law?

2 A Well, we present the prongs of proving damages in civil  
3 litigation. So one prong is the loss of earnings capacity  
4 piece of it. So it's employability assessments, it's  
5 understanding a person's employability following an event or  
6 a disability. It's understanding loss of household services  
7 and then the other piece of the economic damages is what  
8 their future health related goods and services are going to  
9 cost for the rest of their life as a result of the incident  
10 that took place.

11 Q Have you ever provided these services to attorneys or  
12 in actual civil litigation proceedings like this one?

13 A Yes, I have.

14 Q Okay. And just, generally speaking, what's the nature  
15 of the services that you're typically providing in civil  
16 litigation like this?

17 A It's typically employability analysis assessments,  
18 losses of earning capacity assessments and lifecare planning.

19 Q Are you compensated for those services?

20 A Yes.

21 Q Are you being compensated for your services here today?

22 A Yes.

23 Q Does that compensation affect your professional  
24 judgment in any way?

25 A No.

Karen Simone - Direct

1 Q Did there come a time when were you asked to evaluate  
2 this specific case --

3 A Yes.

4 Q -- with Mr. Stevens, Christopher Stevens?

5 A Yes.

6 Q Specifically who asked you to do that?

7 A Mr. Rob Thorpe.

8 Q He's one of the attorneys here today?

9 A That's correct.

10 Q What were you asked to do; what information were you  
11 asked to consider?

12 A I was asked to assess whether there were any reasonable  
13 accommodations that could have been made that would have  
14 allowed Mr. Stevens to remain employed with Rite Aid and also  
15 his employability following job termination in 2011.

16 Q The assessment of whether there's potential reasonable  
17 accommodations, is this something you have experience?

18 A Yes. I've been working with employers for decades to  
19 help them understand how to accommodate for people.

20 Q Are you ever asked to advise or consult with employers  
21 on these issues?

22 A I'm sorry. Can you say again.

23 Q Have you ever been asked to advise or consult with  
24 employers on these issues whether and what type of reasonable  
25 accommodations can be provided?

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1 A Yes, absolutely. Especially my work experience with  
2 Crawford and my work experience with Met Life.

3 Q In terms of the documents -- let me ask you this: Did  
4 you review any documents in preparation or as part of your  
5 analysis of this case?

6 A Yes. I reviewed medical records provided to me,  
7 certain legal documents, employer records, employment  
8 records. Obviously my interview of Mr. Stevens.

9 Q And in terms of the employer records, do you recall  
10 whether you had the opportunity to view Rite Aid's job  
11 description for pharmacist?

12 A Yes, I did.

13 Q Did you also have the opportunity to view any of  
14 Mr. Stevens' records or documents relative to his efforts to  
15 get a new job after being fired?

16 A Yes, I did.

17 Q I believe you mentioned a moment ago that you did  
18 personally interview Mr. Stevens?

19 A Yes, I did.

20 Q Can you just tell us a little bit about that interview  
21 and some of your, what your impressions were of that  
22 interview of Mr. Stevens?

23 A Sure. When I met Mr. Stevens he struck me as a quiet  
24 and somewhat reserved person. As the interview progressed he  
25 did cooperate and give me answers but he was quiet and didn't

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1 elaborate a lot initially, but as he became more comfortable  
2 and he started talking more about what occurred, it became  
3 very apparent how embarrassed he was that he wasn't working  
4 and that he had been fired from a job and he was very  
5 concerned about caring for his children and what his future  
6 economic status is going to be. He had worked for 40 years  
7 for one company and so that was a severe source of concern  
8 for his future.

9 MR. RAVEN: Objection. Move to strike.

10 THE COURT: Well, I think part of the answer can  
11 stand but I think I'll strike the part that has to do with  
12 her assessment of his embarrassment, whether or not he was  
13 bothered by not being able to support his family and all the  
14 other things we've heard from other witnesses, but I'll  
15 strike that because this witness is not qualified to testify  
16 in that area.

17 MR. WHITAKER: Okay.

18 Q What did you learn -- what, if anything, did you learn  
19 about Mr. Stevens' educational background?

20 A I learned that he graduated from Whitesboro High School  
21 in 1972. By his report he was a straight A student. That he  
22 had gone on to Utica College, the first in his family, and  
23 after a couple of years transferred to the Albany School of  
24 Pharmacy where he graduated in 1977 with a bachelors in  
25 pharmacy.

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1 Q As part of your analysis did you examine the licensing  
2 requirements for a pharmacist in New York State?

3 A I did.

4 Q And what were your conclusions based on that analysis?

5 A That he's qualified -- he holds a current valid  
6 license.

7 Q Did you discover anything, as part of your analysis of  
8 the licensing requirements, that requires a pharmacist to be  
9 certified to immunize?

10 A Can you say that again.

11 Q Is the ability -- is certification to immunize part of  
12 the licensing requirements for a pharmacist in New York?

13 A No, it is not. It's a separate thing.

14 Q What is the importance or, I guess, what is the  
15 relevance of Mr. Stevens' educational background and his work  
16 experience in terms of his prospects for employability?

17 A Well, Mr. Stevens has a bachelor's degree in pharmacy  
18 and he's only ever worked in retail so he doesn't have a  
19 particularly diverse background in pharmacy. Those two  
20 factors put him at a competitive disadvantage to what is out  
21 there in the labor market in terms of competing with people  
22 that have a doctorate in pharmacy and have some diversity to  
23 their background.

24 Q Can you just explain a little bit more to the jury  
25 about that. You mentioned doctorate in pharmacy. How common

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1 is it for young pharmacists to have that now?

2 A That's standard of education now is doctorate in  
3 pharmacy or they call it a PharmD.

4 Q As part of your analysis here, did you have the  
5 opportunity to learn about Mr. Stevens' medical history?

6 A Yes.

7 Q What did you learn?

8 A I learned that he was diagnosed with trypanophobia,  
9 which is the fear of needles, and also he was diagnosed with  
10 the fear of heights, both of which are anxiety disorders and  
11 he was also diagnosed with obsessive compulsive personality  
12 disorder.

13 Q Were you also asked to familiarize yourself or I should  
14 say did you look at documentation regarding the circumstances  
15 of Mr. Stevens' termination from Rite Aid?

16 A Yes, I did.

17 Q And what did you learn?

18 A I learned that Rite Aid started requiring their  
19 pharmacists to become immunizing pharmacists and that  
20 Mr. Stevens had informed them that he was unable to become an  
21 immunizing pharmacist and that he had the fear of needles and  
22 requested an accommodation and Rite Aid turned around and  
23 asked him some additional questions and did not feel that it  
24 qualified under the ADA and terminated his employment.

25 Q Miss Simone, I want to take one step backwards very

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1 briefly because we talked about the licensing requirements  
2 for a pharmacist. Can you just explain to the jury what the  
3 Dictionary of Occupational Titles is?

4 A Sure. It's a catalog of about 12,700 jobs that are --  
5 exist in our economy or supposed to exist in our economy.

6 Q Do you know who authors and publishes that?

7 A Right. The Department of Labor.

8 Q The United States Department of Labor or New York State  
9 Department of Labor?

10 A United States Department of Labor.

11 Q Can you consider this dictionary as part of your  
12 analysis of Mr. Stevens' case?

13 A Well, it's one of the sources of information I always  
14 look at.

15 Q How is it relevant to your analysis?

16 A Well it gives a description of the job.

17 Q Of the job of?

18 A Of a pharmacist or any other job that you want to look  
19 up; that some of the jobs we have today are not included in a  
20 Dictionary of Occupational Titles.

21 Q I know you don't know the actual definition off the top  
22 of your head. Is it a relatively short or long definition  
23 from your memory?

24 A It's about this long (indicating).

25 THE COURT: Well, the record can't reflect that.

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1 Why don't you translate that into English.

2 THE WITNESS: Three inches. Let me measure  
3 specifically.

4 Q Miss Simone, was that definition a part of the report  
5 that you produced in this case?

6 A Yes.

7 Q Would it help if I showed it to you?

8 A I have it right here.

9 Q You do have it with you?

10 A Okay.

11 Q Could you just read that definition to the jury,  
12 please?

13 A Sure. Compounds and dispenses prescribed medication,  
14 drugs and other pharmaceuticals for patient care according to  
15 professional standards and state and federal legal  
16 requirements. Reviews prescriptions issued by physician or  
17 other authorized prescriber to ensure accuracy and determine  
18 formulas and ingredients needed. Compounds medications using  
19 standard formulas and processes such as weighing, measuring  
20 and mixing ingredients. Directs pharmacy workers engaged in  
21 mixing, packaging and labeling pharmaceuticals. Answers  
22 questions and provides information to pharmacy customers on  
23 drug interactions, side effects, dosage and storage of  
24 pharmaceuticals. Maintains established procedures concerning  
25 quality assurance, security of controlled substances and



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1 disposal of hazardous waste drugs. Enters data such as  
2 patient name, prescribed medications and cost to maintain  
3 pharmacy files, charge system and inventory. Make the same  
4 medications to determine identity, purity and strength. May  
5 instruct interns and other medical personnel on matters  
6 pertaining to pharmacy or teaching college of pharmacy. May  
7 work in hospital pharmacy and be designated pharmacist  
8 hospital.

9 Q In the field of vocational rehabilitation, how  
10 authoritative is this dictionary that the department of labor  
11 publishes?

12 A Well, it's the standard for job descriptions.

13 Q Okay. I know that was a long definition but am I  
14 correct in stating that it does not mention the ability to  
15 give immunizations?

16 A Correct. It does not mention it.

17 Q I'd like to shift gears to the reasonable -- the issue  
18 of reasonable accommodations. Miss Simone, what is your  
19 understanding as to what the term reasonable accommodation  
20 means?

21 A Reasonable accommodation is changing or modifying a job  
22 or a work environment so that somebody can perform the job or  
23 compete for the job and enjoy the same benefits as other  
24 people that are employed.

25 Q Did you have an opportunity to examine whether there

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1 were any reasonable accommodations available for Mr. Stevens  
2 in this case?

3 A Yes.

4 Q And what were your conclusions and opinions regarding  
5 that?

6 A Well, my conclusions and opinions were that there were  
7 several accommodations that could have been considered for  
8 Mr. Stevens.

9 Q Can you please just explain to the jury what those  
10 accommodations are?

11 A Sure. Well, first and foremost, it could have been  
12 considered that he could have been reassigned to a bigger  
13 store that had more than one pharmacist on at any given time  
14 so that the other pharmacists could have given the  
15 immunizations. It may be in that scenario that he would have  
16 been required to reduce his hours to less than full time but  
17 nevertheless that would have been an option to consider.  
18 They could have changed the immunization schedule or made an  
19 immunization schedule at his store so that he was only  
20 assigned to work during hours or times when immunizations  
21 were not offered. They could have considered diverting  
22 immunizations to a nearby store and they could have  
23 considered offering him a different job all together that he  
24 may have been qualified to perform such as a pharmacy  
25 technician and they could have informed him or offered him to

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1 attend desensitization therapy in an effort to possibly  
2 eliminate his phobia or at least reduce it to the point where  
3 he would no longer have that limitation and he could fully  
4 function as an immunizing pharmacist.

5 Q Now, just following up on some of those accommodations.  
6 You mentioned reassignment to a larger store. Did you have  
7 the opportunity to consider any information relative to the  
8 size and resources of Rite Aid?

9 A Yes.

10 Q Based on the information you reviewed can you just  
11 explain for the jury approximately how many stores Rite Aid,  
12 stores and locations that Rite Aid has?

13 A I don't know the exact number of stores. I know there  
14 are several stores in the vicinity. Mohawk Valley I also  
15 consider Central New York because many people commute to  
16 Syracuse to work, as well. I considered the deposition  
17 testimony of Mr. Spink's in which there were several stores  
18 that had more than one pharmacist on on particular days that  
19 were consistently high traffic.

20 Q And do you know approximately how many stores in 2011  
21 were within the City of Utica, how many Rite Aid stores?

22 A Not off the top of my head.

23 THE COURT: Okay. We're going to break for lunch  
24 now, it's 12:30. We'll see you back at 1:30.

25 Court stands adjourned.

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1 (Lunch break taken)

2 (Jury present)

3 THE COURT: All right. Mr. Whitaker, you may  
4 continue.

5 MR. WHITAKER: Thank you, your Honor.

6 BY MR. WHITAKER:

7 Q Miss Simone, I believe where we left off I had asked  
8 you a question regarding approximately how many stores that  
9 Rite Aid has.

10 A Right.

11 Q Please expand upon that.

12 A Sure. When I did my research, I found that Rite Aid  
13 has approximately 4600 stores in 31 states within the United  
14 States. And that in the Utica/Rome area there were  
15 approximately ten Rite Aid Pharmacy stores within 11 miles.

16 Q And within the Utica Rome area, were there any stores  
17 that were very closely located to each other?

18 A It appeared that way. Few blocks.

19 Q I'm sorry?

20 A A few blocks.

21 Q By a few blocks, some of them are separated by a few  
22 blocks. I'd like to move onto the earnings capacity part of  
23 your analysis.

24 Miss Simone, were you asked to study the earning  
25 history of Mr. Stevens as a pharmacist?

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1 A Yes, I was.

2 Q And what were your conclusions; what did you find out  
3 about his earning capacity?

4 A That he earned anywhere from 131,000 a year to 135,000  
5 a year as a pharmacist.

6 Q Can you explain for the jury what the term, what the  
7 term earning capacity -- earning capacity means?

8 A Earnings capacity is a person's ability to work and  
9 earn a certain wage.

10 Q And do you have an opinion regarding Mr. Stevens'  
11 earning capacity had he not been fired by Rite Aid?

12 A Well, considering -- yes, I do. I have an opinion and  
13 my opinion is that his earnings capacity would have been  
14 consistent with what he had earned in the past. There's no  
15 reason to believe that there would have been any career  
16 changes or anything other than remaining to work as a  
17 pharmacist considering he had done it for 35 years for the  
18 same employer.

19 Q And just to clarify, when I'm asking you throughout  
20 what your opinion is, I'm asking you what's your professional  
21 opinion as a vocational rehabilitationist. Is that what you  
22 understand what I'm asking you?

23 A Yes. I understand that.

24 Q Miss Simone, you referred to the term residual  
25 employability analysis?

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1 A Yes.

2 Q Can you explain to the jury what that term means?

3 A Residual employability is a person's employability  
4 following an event or a disablement. Residual meaning what's  
5 left after something has occurred.

6 Q And is in within your field of expertise, is there a  
7 particular method that's used to make this determination?

8 A Yes, there is.

9 Q Can you explain that for the jury, please?

10 A Sure. To determine a person's residual employability,  
11 we look at their age, we look at their education, training,  
12 work experience, any limitations they may have and then what  
13 is available in the labor market as the last piece to that.

14 Q And did you conduct this type of analysis relative to  
15 Mr. Stevens?

16 A Yes, I did.

17 Q What were your conclusions?

18 A My conclusions were that, initially, that he was  
19 qualified at least on paper to work as a pharmacist in other  
20 venues, if you will, in the labor market and certainly as an  
21 assistant to a pharmacist or what they call a pharmacy  
22 technician.

23 Q I'm going to ask you if you're familiar with another  
24 term. Are you familiar with the term mitigation?

25 A Yes.

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1 Q What is meant by that term?

2 A Mitigation is an attempt to lessen the severity of  
3 something for the consequences of something.

4 Q And how is mitigation important to your employability,  
5 employability analysis?

6 A Because it helps me understand what a person has done  
7 to impact their circumstances.

8 Q And in evaluating this case, did you analyze whether  
9 Mr. Stevens, in your opinion, appropriately attempted to  
10 mitigate his damages?

11 A Yes. I did look at that and based on my interview of  
12 Mr. Stevens and the records that were provided to me, he had  
13 attempted to look for work and submitted several inquiries  
14 and applications in an attempt to secure another job as a  
15 pharmacist.

16 Q Now, we've heard some testimony in this trial already  
17 about the fact that Mr. Stevens remains unemployed even  
18 through today. But based on your interview of Mr. Stevens  
19 and your review of the records in this case do you believe,  
20 is it your opinion, your professional opinion that  
21 Mr. Stevens has made a good-faith effort to mitigate his  
22 damages?

23 A Yes. He made a good-faith effort in terms of looking  
24 at the context of this situation. This is a gentleman who  
25 had worked for the same employer for 40 years. He never had

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1 to look for a job in his entire life. He never had to  
2 develop a resume. He never had to sell himself. He had  
3 always worked there. So to go out and to submit all his  
4 applications, it's my understanding he visited a few  
5 employers in person. He had called a few people. He made a  
6 good-faith effort, the best that he knew how to make.

7 Q Miss Simone, can you briefly explain some of -- both  
8 the assets and the barriers that exist relative to  
9 Mr. Stevens' ability to get a job?

10 A Sure. Well, certainly his assets are that he does have  
11 a degree in pharmacy. He has a lot of work experience so  
12 he's got great skills. He is licensed. There are no  
13 infractions on his license or history of suspensions or  
14 anything like that, so those are assets. And he has worked  
15 for the same employer for several years which would appear to  
16 some people as being very loyal, which it is, but to a hiring  
17 manager that sort of turns into a barrier because then the  
18 red flags come up as to why somebody who is in their 50s who  
19 has worked for the same employer for 40 years is now out of a  
20 job and looking for employment. So some barriers are his  
21 age, the fact that he's competing for jobs with recent  
22 graduates who have doctorate degrees because that's now the  
23 requirement; that he has been terminated from employment and  
24 that he does only have experience in one sector of pharmacy.  
25 So he doesn't have the diverse background in pharmacy.

Vicky Ann Theleman, RPR, CRR  
USDC Court Reporter



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1 Q And would any of these barriers that you just  
2 discussed, when Mr. Stevens is applying for a job, would any  
3 of those barriers have an impact on his ability to get an  
4 interview to go to the next step if you will?

5 A Well, sure. As I said, the same factor that may seem  
6 like an asset because he was loyal, as a hiring manager  
7 you're wondering what happened and so when you're looking at  
8 that resume, and you have 20 or 30 other job applicants from  
9 people who have doctorate degrees, you're asking yourself  
10 something doesn't seem right and what is the situation.

11 Q I'm going to present another term to you: Transferable  
12 skills analysis. Are you familiar with that term?

13 A Yes.

14 Q Can you please explain to the jury what that means?

15 A So that's the skills and abilities that you acquire  
16 through your work history, through your work experience, that  
17 you can rely upon or consider when looking at maybe is there  
18 another job out there that I could do with those skills and  
19 is there a market for it in a labor market.

20 Q Just so the jury understands. This transferable  
21 skills, is this part of what you're looking at in evaluating  
22 Mr. Stevens' ability to mitigate his own damages?

23 A Absolutely.

24 Q So did you conduct a transferable skills analysis  
25 relative to Mr. Stevens?

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1 A I did.

2 Q What were your conclusions?

3 A Well, my conclusions were that he certainly is  
4 qualified on paper, as I said, to be a pharmacist. And so  
5 the real test to that is are his skills marketable out there  
6 in today's labor market? So I investigated a variety of  
7 settings within the pharmacy industry.

8 Q And what I'd like to do now is if you could just walk  
9 the jury through what, what some of these other opportunities  
10 are that exist that you found?

11 A Sure. I looked at, of course, retail pharmacy and the  
12 employers that were contacted said they do offer immunization  
13 and most of them are large chain retail pharmacies and that  
14 their pharmacists do administer the immunizations but they  
15 would not comment on whether they knew it was mandatory or  
16 not. They would refer us to the district office and then we  
17 didn't get a call back on one of them. And then I  
18 investigated, okay, could he then go work in a clinical  
19 setting? When I say clinical, I mean in a hospital or some  
20 health care facility where immunizations are not commonplace  
21 for the pharmacist. And then through labor market research  
22 and talking to professors and people within those health care  
23 industry, organizations, I discovered that he wasn't really  
24 qualified. He can't compete with the, what they're looking  
25 for in the clinical pharmacies so then I turned my attention

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1 to look at what I call not direct patient contact jobs. So  
2 consultant or mail order pharmacies which has emerged in the  
3 recent years and unfortunately there's just no labor market  
4 for those jobs in Central New York.

5 Q What about the work as a consultant, did you consider  
6 that?

7 A Yes. I'm sorry. I thought I said that.

8 Q Oh, okay.

9 A Consultant and there was not really a viable market for  
10 that either.

11 Q What is meant by the term labor market analysis?

12 A Labor market analysis is using data sources, contacting  
13 people in the labor market to understand what employers are  
14 looking for, what's the climate out there for people with  
15 certain skills to, to get jobs. The likelihood of them  
16 getting selected for jobs.

17 Q And did you conduct a labor market analysis in this  
18 case relative to Mr. Stevens?

19 A I did.

20 Q What were your conclusions?

21 A Well, my conclusions were that for the positions of  
22 consultant, they're not viable. That the clinical pharmacist  
23 positions were not a feasible option for Mr. Stevens to  
24 consider but there were the several pharmacy tech positions  
25 that were available.

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1 Q And Mr. Stevens would be qualified, in your opinion?  
2 Would Mr. Stevens be qualified for that position?

3 A He would be over qualified. He's certainly qualified  
4 but he's over qualified, but yes.

5 Q And because he's over qualified what would that mean in  
6 terms of his prospects as employability as a pharmacy tech?

7 A An employer might be suspicious, again, as to why a  
8 pharmacist is applying for a pharmacy tech position. Again,  
9 a red flag.

10 Q Miss Simone, you mentioned in your report that you had  
11 considered some statistics by New York State and United  
12 States Department of Labor, is that correct?

13 A That's correct.

14 Q Are you familiar with the term, let me ask you this:  
15 What source of data does the New York State Department of  
16 Labor issue on employment opportunities for occupations?

17 A Well, they provide data on short-term employment  
18 projections, long-term employment projections, current  
19 existing numbers and wages.

20 Q And that data that they release, is that specific to  
21 occupations or is that sort of more general?

22 A They have both.

23 Q So it is specific to occupations?

24 A Yes.

25 Q Did you review -- we'll start with the long-term

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1 projections. Have you reviewed the long-term projections by  
2 the New York State Department of Labor relative to work as a  
3 pharmacist?

4 A I did.

5 Q And if you could just explain for the jury what years  
6 does that long-term projection cover?

7 A I believe 2012 through 2022.

8 Q If I told you it's 2010 to 2020.

9 A I'm ahead of myself.

10 Q Do you have a copy of the report with you by any  
11 chance, the New York State Department of Labor?

12 A I have it in my --

13 Q Projection.

14 A I have it in my briefcase.

15 Q All right. I'll just move on. If you remember, what  
16 was the long-term projection for pharmacists in that report  
17 in the Mohawk Valley region?

18 A Fourteen percent growth.

19 Q Did any of the additional information or other  
20 projections by the department of labor conflict with that in  
21 any way?

22 A Yes. The short-term projections, which are for the  
23 years 2013 through 2015, sorry, projected a negative 2.2 with  
24 a loss of ten jobs in the Mohawk Valley region and for the  
25 Central New York region it projected a flat zero percent. No

Karen Simone - Direct

1 growth.

2 Q So the jury understands, probably most of them do  
3 anyways, when you say Central New York area, what geographic  
4 area does that cover?

5 A I apologize. Onondaga County, Syracuse, New York.

6 Q So that would reach out to Syracuse?

7 A Correct.

8 Q And these short-term projections, are these issued more  
9 frequently than the long-term projections by the state  
10 department of labor?

11 A Yes.

12 Q Based on your analysis that you conducted relative to  
13 Mr. Stevens, are you surprised with the difficulties he's had  
14 in gaining employment since he was fired?

15 MR. RAVEN: Objection.

16 THE COURT: Sustained.

17 Q Miss Simone, based on your analysis, in your  
18 professional opinion what is the likelihood of Mr. Stevens  
19 gaining employment in the field of pharmacy?

20 A It's my professional opinion that his employability is  
21 severely diminished because of all the barriers that I  
22 previously mentioned.

23 Q And I believe you may have testified to this earlier  
24 but in terms of your review of the efforts that Mr. Stevens  
25 has made to gain employment, what is your professional

Karen Simone - Cross

1 opinion as to whether he has made a good-faith effort?

2 A Well, it's my opinion that he did make a good-faith  
3 effort. He made the best effort that he knew how.

4 Q And those barriers that you discussed for the jury that  
5 exist within the marketplace, in your opinion do they -- is  
6 it your opinion that they have impeded his ability to get a  
7 job over the last three years?

8 A Yes.

9 MR. WHITAKER: That's all I have, your Honor.

10 THE COURT: All right. Mr. Raven, you may  
11 cross-examine.

12 MR. RAVEN: Thank you, your Honor.

13 CROSS-EXAMINATION

14 BY MR. RAVEN:

15 Q Good afternoon.

16 A Good afternoon.

17 Q Miss Simone, you were called here to testify today  
18 obviously in connection with Mr. Stevens' litigation,  
19 correct?

20 A Correct.

21 Q And the majority of your business is evaluating in the  
22 scope of litigation?

23 A Well, no, I do a fair amount of testimony for Social  
24 Security too.

25 Q So besides Social Security and litigation, that's

Karen Simone - Cross

1 essentially what you do in your business?

2 A I do do some case management too.

3 Q Do you own the business? I'm sorry. I couldn't hear  
4 you.

5 A Yes, I own the business.

6 Q All right. Now, you came to certain conclusions after  
7 evaluating Mr. Stevens and looking at his records and  
8 employment records and so forth and one of the first things  
9 that you talked about on direct examination was the licensing  
10 and registration requirements of pharmacists in New York?

11 A Correct.

12 Q And, Miss Simone, you would agree with me that  
13 licensing requirements and certifications set a minimum  
14 standard for industries and professions, such as pharmacists,  
15 correct? It's the minimum standards?

16 A You have to meet certain criteria in order to become a  
17 licensed pharmacist.

18 Q All right.

19 A Yes.

20 Q Miss Simone, you would agree with me, would you not,  
21 that the industry itself has a right to set higher standards?

22 A The industry has a right to set certain standards for  
23 job descriptions. I guess I don't understand exactly what  
24 you're saying.

25 Q Well, in other words -- let's take the pharmacy



Karen Simone - Cross

1 situation. You have to meet certain criteria to become a  
2 pharmacist, correct?

3 A Correct.

4 Q And then when one gets out into the field and starts  
5 applying for jobs and they go to different employers,  
6 different employers may have different criteria for your  
7 being employed, correct?

8 A Sure.

9 Q Okay. And it's no different from other industrials  
10 such as teaching perhaps, correct?

11 A Correct.

12 Q Or working in a hospital?

13 A Correct.

14 Q Or perhaps working as a contractor, correct?

15 A Correct.

16 Q And the standards that the employer sets can sometimes  
17 be higher and require more of an individual than what is set  
18 by the minimum standards in order to get the license, is that  
19 correct?

20 A Yes. They can ask more of an employee.

21 Q And in your experience in evaluating these cases and  
22 determining employability of individuals, you would agree  
23 with me that no industry stays stagnant, correct?

24 A Correct.

25 Q And the standards that existed perhaps in the 1960s for

Karen Simone - Cross

1 an industry or for a profession are certainly not the same  
2 that exist now?

3 A True. Not for all but for some.

4 Q Okay. And for many professions those skills that are  
5 required, in order to keep up with technology, to keep up  
6 with new methods of treatment and so forth, the industry has  
7 to change, correct?

8 A Correct.

9 Q All right. And you wouldn't argue with an employer who  
10 wants to set a higher standard for treating patients than  
11 just going by the basics, you wouldn't argue with that  
12 concept, would you?

13 A No.

14 Q Of course not. Now, the pharmacy industry, by the way,  
15 how many pharmacy cases have you testified in?

16 A This is the only pharmacy, pharmacist.

17 Q Pharmacist. This is the first case?

18 A Yes.

19 Q Okay. So up until now you haven't had to do any  
20 research regarding the pharmacy industry in terms of  
21 employability, correct?

22 A Well, if you're talking about specific to  
23 pharmaceuticals or just pharmacists?

24 Q I'm talking about just pharmacists.

25 A Just pharmacists, right.

Karen Simone - Cross

1 Q So you have never done any investigation on that before  
2 and you've never testified in that area before, correct?

3 A Correct.

4 Q All right. Now, you talked about on direct a little  
5 bit about reasonable accommodations for Mr. Stevens and if I  
6 understood you correctly you were talking about accommodating  
7 him in the context of putting him in a position, a different  
8 position than he had before and excusing him from  
9 immunization, correct, where he didn't have to do that?

10 A Well, I wouldn't call it a different position. It's  
11 still pharmacist, it's just at a different location. A  
12 different way of --

13 Q Let me rephrase that. You aren't suggesting that his  
14 employer should have put him in a position where he was  
15 excused completely, one hundred percent, from performing the  
16 function of immunization?

17 A No. What I said was his employer had an obligation to  
18 consider various options, including reassigning him to a  
19 different location but also desensitization therapy or that  
20 recommendation would have maybe, if successful, allowed him  
21 to remain there.

22 Q Outside of the desensitization cognitive therapy?

23 A Okay.

24 Q All of the other suggestions that you made in terms of  
25 putting him in a store with dual pharmacists, sending a

Karen Simone - Cross

1 patient who came in and said I want a flu shot to a different  
2 store that's perhaps two or three blocks away?

3 A Right.

4 Q Those are suggestions where Mr. Stevens would not have  
5 to immunize, correct?

6 A Correct.

7 Q Now, let me ask you about the desensitization. I'm  
8 going to switch and I'm going to come back to my original  
9 subject.

10 You are not suggesting to this jury that an  
11 employer has an obligation to treat a condition?

12 A No, I'm not suggesting that they treat it.

13 Q I didn't mean to cut you off.

14 A No. That's okay.

15 Q So if a different type of impairment, such as somebody  
16 has diabetes and presented to their employer saying I need an  
17 accommodation because I have diabetes. I have to leave early  
18 on Thursdays because I have a doctor's appointment or during  
19 the course of the day sometimes I get a little dizzy, I may  
20 have to sit down or I may need a break. Those are  
21 accommodations where the employee can still do their job, is  
22 that correct?

23 A That's correct.

24 Q And --

25 A Maybe.

Karen Simone - Cross

1 Q They're asking for an accommodation so they can still  
2 do their essential job functions but with an accommodation,  
3 correct?

4 A Correct.

5 Q But you wouldn't expect and you would never suggest to  
6 this jury that the employer had an obligation to either  
7 diagnosis or treat that condition, that would never happen,  
8 correct?

9 A Correct.

10 Q And there's no requirement for that, correct?

11 A Correct.

12 Q So, to suggest that Mr. Stevens' employer should have  
13 sent him for desensitization training, that's a treatment,  
14 correct?

15 A Well, suggesting that this is something that a person  
16 could pursue to help them is different than providing the  
17 actual treatment.

18 Q Well, you're not suggesting that the employer has an  
19 obligation to suggest a course of treatment for an illness,  
20 are you, any different from a diabetic?

21 A No. I'm suggesting an employer has an obligation to  
22 protect a 40-year asset.

23 Q If the person, again, getting back to somebody who has  
24 diabetes. Do you expect the employer to say, hey, you've got  
25 to go to this doctor or you've got to go for this treatment

Karen Simone - Cross

1 or you need this particular test. It's not the employer's  
2 obligation, you're not suggesting that, are you?

3 A No, but a lot of employers now have wellness programs  
4 to help employees understand how to treat their conditions  
5 and to be well so that they can perform better on the job.

6 Q That's optional, correct. That's not something they're  
7 required to do; that's something that's optional?

8 A Yes, but it's pretty standard with the larger  
9 employers.

10 Q But employers don't have to do it; they don't have to  
11 do it?

12 A No, they don't have to do it.

13 Q And certainly when you're talking about illnesses, it's  
14 one thing for preventive medicine. They don't suggest  
15 treatment for a particular illness and they're not required  
16 to do that, are they?

17 A Can you say that again.

18 Q Let me rephrase it. I didn't phrase that correctly.  
19 You're not suggesting that an employer would be required to  
20 suggest treatment for a particular illness, correct?

21 A They're not required to suggest it.

22 Q Thank you.

23 A No.

24 Q Now, when you use the term reasonable accommodation,  
25 okay, you were using that term in a general sense, correct?

Karen Simone - Cross

1 A Correct.

2 Q Okay. You were not using that term with reference to  
3 what the definition of reasonable accommodation is under the  
4 Americans with Disability Act?

5 A Correct. I was not, right.

6 Q So you don't know that definition?

7 A Well, I know in general the definition.

8 Q If you know in general, would you agree with me that  
9 under the Americans with Disability Act, an employer's  
10 required to provide, to provide a reasonable accommodation so  
11 that the person can perform the essential functions of the  
12 job?

13 MR. WHITAKER: Objection, your Honor.

14 THE COURT: Basis?

15 MR. WHITAKER: Well, he's asking about definitions  
16 under ADA of essential functions. He's asking for a legal  
17 opinion. This is a vocational rehabilitation expert.

18 THE COURT: I don't think he's asking her to give  
19 an opinion. I think he's asking her if she knows about the  
20 definition.

21 MR. RAVEN: Correct.

22 THE COURT: She can tell us what her general  
23 knowledge of that condition is because it dovetails with her  
24 employment practice.

25

Karen Simone - Cross

1 BY MR. RAVEN:

2 Q Are you familiar with that terminology under the  
3 Americans with Disability Act, a reasonable accommodation so  
4 that the person can perform the essential functions of the  
5 job?

6 A Yes. I'm familiar with those terms.

7 Q And that doesn't mean that you have to give them a  
8 different job that doesn't require those functions. It means  
9 so that they can perform their job with those essential job  
10 functions, correct?

11 MR. WHITAKER: Same objection, your Honor.

12 THE COURT: This time I'll sustain it because he is  
13 asking for a legal --

14 Q Now, I believe you told the jury before that you were  
15 trying to determine whether Mr. Stevens could, in fact, get  
16 another job in the area as a pharmacist, correct?

17 A Correct.

18 Q Okay. And you did some analysis as to where the other  
19 Rite Aid stores were, correct?

20 A Yes.

21 Q But you did something else, you tried to contact other  
22 pharmacies, correct?

23 A Correct.

24 Q And you contacted CVS?

25 A Correct.



Karen Simone - Cross

1 Q And Wegman's?

2 A Correct.

3 Q And Walgreens?

4 A Yes.

5 Q And Target?

6 A Correct.

7 Q And Wal-Mart?

8 A And Wal-Mart.

9 Q All right. And your inquiry from those particular  
10 stores was, is the pharmacist required to give immunizations,  
11 correct?

12 A Correct. Is it mandatory.

13 Q Is it mandatory. I think we're on the same page there.

14 A Yeah.

15 Q And you didn't get any response or you were referred to  
16 corporate and you didn't get an answer?

17 A When I got to that particular question, they -- I don't  
18 know why. They stopped and they said that they can't answer  
19 that question.

20 Q So, Miss Simone, as you sit here today you're not able  
21 to tell this jury whether those pharmacies, those retail  
22 pharmacies mandate that their pharmacists be immunizers? You  
23 can't tell the jury that, correct?

24 A I can't tell the jury that.

25 Q You can't tell them that it's not mandated, correct?

Karen Simone - Cross

1 A Right. I only know that the pharmacists there do the  
2 immunizing and they do offer the immunizing, with the  
3 exception of Wal-Mart, didn't have them that year but they  
4 would in the future.

5 Q Now, you've been by all those stores in the past,  
6 correct?

7 A Most of them but not to the pharmacies.

8 Q What's the big sign you see in the windows or outside  
9 the stores, especially around this time of the year,  
10 especially around September, what's the sign you see?

11 MR. WHITAKER: Objection, your Honor. This is both  
12 irrelevant and beyond the scope.

13 THE COURT: Well that maybe some indication of what  
14 the store is offering to its clientele by way of immunization  
15 services so that's what he's asking about.

16 MR. RAVEN: That's what I'm asking.

17 THE COURT: I'll overrule that.

18 MR. WHITAKER: Can we get clarification as to what  
19 time frame the question is in 2011?

20 THE COURT: Timeframe is --

21 BY MR. RAVEN:

22 Q Fine. How about from 2011 to the present?

23 A I don't recall 2011.

24 MR. WHITAKER: Judge, again, just an objection. If  
25 we're talking about beyond 2011, it's irrelevant. If he

Karen Simone - Cross

1 wants to limit the question to 2011 or earlier, that's  
2 different.

3 THE COURT: How is it irrelevant? We're talking  
4 about time of discharge and today and in the future.

5 MR. WHITAKER: This line of questioning pertains to  
6 whether pharmacies were offering this immunization. What's  
7 happening now is not the issue. What matters is the market  
8 in 2011.

9 THE COURT: I disagree with you. I think it's  
10 what's happening now. That directly impacts upon his ability  
11 to get a job today and yesterday and tomorrow and those are  
12 the things we are here to learn about. Overruled.

13 BY MR. RAVEN:

14 Q Do you need the question read back?

15 A Could you, please.

16 MR. RAVEN: Could we have the reporter read back if  
17 we could. I just want to make sure we get the exact  
18 terminology.

19 (Record read back)

20 A So today?

21 Q 2011 today or any time in between.

22 A Well, there are several signs but I think the one  
23 you're looking for is get your flu shot here.

24 Q All right. Now, Miss Simone, have you seen signs that  
25 specifically say flu shots available upon request or

Karen Simone - Cross

1 something to that?

2 A No, I don't recall.

3 Q Have you seen the signs that say no appointment  
4 necessary?

5 A I don't recall any.

6 Q You haven't seen any of those signs?

7 A I don't remember exactly. I get my shots at the doctor  
8 so I don't pay real attention. I've seen the get your flu  
9 shots here. I don't remember the specific terminology on  
10 them.

11 Q Now, I'm going to switch gears again. I'm going back  
12 to something we touched on before. You testified that one of  
13 the things that Rite Aid could have done is that they could  
14 have, in Mr. Stevens' store, had a patient come in and  
15 Mr. Stevens says, I'm sorry, but I'm not an immunizer,  
16 despite the fact that there's a sign outside and said, you  
17 know, but by the way there's a Rite Aid two blocks, three  
18 blocks away, could have sent him to another Rite Aid,  
19 correct? Is that what you said?

20 A I don't think that exactly characterizes what I said.

21 Q What did you say?

22 A I didn't say despite the fact that there's a sign out  
23 front.

24 Q Okay. Forgetting the sign. You said you could have  
25 sent him to another Rite Aid?

Karen Simone - Cross

1 A The sign might say no immunizations or he could have  
2 said we don't give the immunizations here, we give them at  
3 the store two blocks down the road.

4 Q Have you ever researched Rite Aid's marketing of their  
5 immunization program to their patients, have you done any  
6 reach on that whatsoever?

7 A No.

8 Q Would it surprise you to know that they advertise that  
9 flu shots are available upon request in every single store  
10 any time there is a pharmacist on duty? Are you aware of  
11 that?

12 MR. WHITAKER: She's not here as a marketing  
13 expert. She gave a market --

14 MR. RAVEN: I'm sorry, she is. She gave a  
15 marketing analysis.

16 THE COURT: Overruled.

17 A I'm trying to remember what you said now. Repeat.

18 Q Are you aware that Rite Aid markets their immunization  
19 program that any time a pharmacist is on duty that flu shots  
20 and immunizations such as shingles and a number of other  
21 things, pneumococcal, are available to their patients?

22 A I was not aware of that but it doesn't mean that  
23 accommodations can't be made for people.

24 Q Well --

25 A And I only suggested that they consider these options.

Karen Simone - Cross

1 Not that it has to be written in stone.

2 Q So what you're asking Rite Aid or an employer similar  
3 to them to do is to change their marketing and change their  
4 immunization plan to accommodate one pharmacist?

5 A One pharmacist who worked for them for 40 years.

6 Q Would it make any difference whether he worked for Rite  
7 Aid for two years?

8 A Well, I think that they had a loyal employee that --  
9 and really, yes, with any employee there should be an  
10 obligation to protect people that you have invested in.

11 Q Okay. You're not suggesting that you should treat a  
12 two-year employee any different from somebody who worked for  
13 the company for 35 years, are you?

14 A No.

15 Q You treat them equally and the same?

16 A No, but for somebody that has shown you loyalty --

17 Q And your opinion is they change the program simply  
18 because, the entire program simply because of longevity?

19 A I'm just suggesting that they consider these options.  
20 I'm not suggesting that they change their entire marketing  
21 strategy.

22 Q Now, let's talk about Mr. Stevens' attempts to gain  
23 employment. You said he gave it a good try, correct?

24 A Yeah. Yes.

25 Q And there's been testimony that for the most part, with

Karen Simone - Cross

1 a couple of exceptions, Mr. Stevens has gone online and  
2 filled out online applications. Do you understand that?

3 A Yes, I do.

4 Q And his testimony was approximately 40 to 50 times he's  
5 done that and he's done that for the past three-and-a-half  
6 years?

7 A M-m h-m-m.

8 Q Do you understand that?

9 A I do.

10 Q And other than that, Mr. Stevens has never sought,  
11 other than the Department of Labor which is required when he  
12 got his unemployment, he's never sought any assistance  
13 through any type of professionals to help him market himself  
14 and to get a job, do you understand that?

15 A Yes.

16 Q Now, Miss Simone, in your profession, you're familiar  
17 with individuals who can help, and particularly in  
18 professional, professionals, there are people out there that  
19 can help you try to get a job, correct?

20 A That is correct.

21 Q There's something known as job coaches?

22 A Yes.

23 Q Okay. There's employment agencies?

24 A Correct.

25 Q Okay. And these are people who can help those who are

Karen Simone - Cross

1 not familiar with the process rather than just sitting  
2 online all day and filling out applications, there are  
3 professionals that can help you, correct?

4 A Correct.

5 Q And you, in your profession as a vocational expert and  
6 rehabilitation, you even suggest those to people, don't you?

7 A Yes.

8 Q Okay. Did you ask Mr. Stevens whether, in fact, he  
9 consulted with a job coach?

10 A I believe he said that he had not consulted with a  
11 professional.

12 Q Did you ask him whether he consulted with an employment  
13 agency?

14 A No. He mentioned that he had gone to the department of  
15 labor.

16 Q Okay.

17 A Which is where most people go.

18 Q Is that only because of the unemployment benefits that  
19 he received?

20 A Well, I don't know that that was the only reason why.

21 Q Did he tell you he went back to the department of labor  
22 after his unemployment ran out?

23 A I don't recall that conversation.

24 Q So when you say he made good efforts to find a job, he  
25 had those options open to him but he didn't take them, did



Karen Simone - Cross

1 he?

2 A Well --

3 Q Yes or no.

4 A That would require him to know about them.

5 Q But he did not make those efforts, correct?

6 A Correct, but he didn't know about them.

7 Q How do you know he didn't know about them? You didn't  
8 ask him, did you?

9 A I asked him what he did and again he, he's never had to  
10 look for a job. He wouldn't necessarily know to access  
11 certain resources.

12 Q But you didn't ask him those questions? You didn't ask  
13 him whether he sought a job coach or any typo of --

14 A I didn't ask him about the job coach, true.

15 Q You didn't ask him about an employment agency?

16 A Correct. We talked about the department of labor.

17 Q Miss Simone, you would agree with me, had he consulted  
18 with an employment agency or a job coach, even somebody to  
19 help him with his resume, that would have increased his  
20 chances to find a job, correct?

21 A One would hope so but you can't say for sure.

22 Q I'm not asking you for sure. I'm just saying it would  
23 have increased his chances?

24 A I would hope so.

25 Q Okay. Now, you said that his prospects for finding a

Karen Simone - Cross

1 job in the future, I don't -- I forgot your word but you said  
2 they're not good, correct?

3 A Yes.

4 Q You would agree with me that one of the reasons why his  
5 job prospects into the future are not good is because he  
6 still can't immunize, correct?

7 A Well it certainly is one of the barriers.

8 Q Okay.

9 A Sure.

10 Q Let's talk about those barriers for a moment.  
11 Mr. Stevens is now 60 years of age, correct?

12 A Correct.

13 Q He's had a lot of experience over the years?

14 A Correct.

15 Q Correct? And that's a good thing, that's not a  
16 barrier, that gives him a better chance of getting a job,  
17 correct?

18 A No, not necessarily.

19 Q Well, he's got good experience you'd agree with me?

20 A No, he's got great experience. I don't disagree with  
21 that at all.

22 Q Somebody whose got good experience certainly has a  
23 better chance of getting a job than somebody who has no  
24 experience or little experience you'd agree with that,  
25 wouldn't you?

Karen Simone - Cross

1 A Not necessarily.

2 Q Well, you're not suggesting that people would  
3 discriminate against him simply because he's 60 years old,  
4 would you?

5 A I will tell you that you would hope that people  
6 wouldn't discriminate but when they screen applications, they  
7 do look at these things.

8 Q Okay. Let me ask you this.

9 A It's a reality.

10 Q You mentioned the fact that he had been terminated or  
11 fired from his job would be a barrier, that's one of the  
12 negative parts of it, correct?

13 A Well sure.

14 Q Now, if Mr. Stevens were to walk in and actually get an  
15 interview and he told that prospective employer that, hey,  
16 the only reason I was terminated was because I'm not an  
17 immunizer, that would be a pretty valid excuse. It's not  
18 like he stole or that he mixed up prescriptions and killed  
19 somebody or something like that. It's because he wasn't an  
20 immunizer. That's not a negative in terms of if he was going  
21 to be employable, would it?

22 A Having been a hiring manager, anybody who has been  
23 terminated, especially for a reason like that, would raise a  
24 red flag for me because when you're a hiring manager and you  
25 have valuable employees that have a lot of experience, you

Karen Simone - Cross

1 don't want to let them walk out that door unnecessarily. So  
2 that would be a red flag.

3 Q But if the prospective employer thought well, gee, that  
4 company was stupid for letting him go, we've got ourself a  
5 catch, that's a possibility, right?

6 A It's always a possibility.

7 Q Okay. Now, you gave some testimony as to Mr. Stevens'  
8 salary. Okay. I think you said anywhere from 135,000,  
9 130,000, somewhere in that ballpark?

10 A M-m h-m-m.

11 Q Would you agree with me that if Mr. Stevens went out  
12 and got a job tomorrow, he would have no future damages,  
13 correct, no wage loss?

14 A Well, depends on what job he got.

15 Q Okay. Well, are pharmacists, and let's pick the retail  
16 generally, the retail chains, they pay about the same in the  
17 area of Utica?

18 A There's a range and in the same vicinity maybe if it  
19 were full time.

20 Q He's not going to be paid less than hundred thousand  
21 dollars to be a pharmacist with his experience, correct?

22 A I wouldn't think so.

23 Q So, if he were to get a job tomorrow he would be able  
24 to, he would not have any future economic loss unless he took  
25 a job for, say, 10 or \$15,000 less?

Karen Simone - Cross

1 A If it were full time.

2 Q Okay. That's what I'm talking about, full time.

3 A Yeah. Okay.

4 Q Now, you mentioned something about other possibilities  
5 such as working in a clinical setting?

6 A Right.

7 Q Okay. And that's not a possibility for Mr. Stevens,  
8 correct?

9 A It really is not feasible.

10 Q How about in a hospital?

11 A That is the clinical setting.

12 Q What I meant was in a pharmacy-type place that doesn't  
13 have contact with patients such as mail order?

14 A Oh, correct. What was the question. I'm sorry.

15 Q I believe you said that those were not available to  
16 him?

17 A There is not a large job for that in Central New York.

18 Q If he moved he might have more of a chance getting a  
19 job in that field?

20 A He may but a lot of them did want hospital experience,  
21 as well as just a preferred criteria.

22 Q If he was in the mail order?

23 A Yeah. When I looked at the mail order it was the  
24 consultant role. I'm sorry. It was the pharmacy consultant  
25 role that had additional qualifications that they were

Karen Simone - Redirect

1 looking for that Mr. Stevens didn't have. Not the mail  
2 order. I apologize.

3 Q Not a problem. So if he did move and he was able to  
4 relocate, he'd have a better chance becoming employed perhaps  
5 by one of those types of places?

6 A Possibly the opportunities are not as great as they are  
7 as a pharmacist but they are out there.

8 Q But it is a possibility?

9 A It's a possibility.

10 MR. RAVEN: Okay. Thank you, Miss Simone. Thank  
11 you very much.

12 THE COURT: Redirect?

13 MR. WHITAKER: Yes, your Honor.

14 REDIRECT EXAMINATION

15 BY MR. WHITAKER:

16 Q Miss Simone, you were asked an awful lot of questions  
17 about your proposed reasonable accommodations. Is it fair to  
18 say that all you're suggesting is that the employer -- let me  
19 back up. Are you familiar with the phrase interactive  
20 process?

21 A Yes.

22 Q Isn't that what you're suggesting Rite Aid should have  
23 engaged in here?

24 A Yes.

25 Q In your opinion did they do that?

Karen Simone - Redirect

1 A No.

2 Q In your opinion did they have a responsibility to do  
3 that?

4 A Yes.

5 Q And part of engaging in that interactive process would  
6 have included discussing some of these reasonable  
7 accommodations?

8 A Yes. Exploration of different options that might work  
9 for both Mr. Stevens and for Rite Aid.

10 Q There was a lot of discussion about, you know, and  
11 suggestions that you're asking Rite Aid to change their  
12 marketing strategy, are you doing that?

13 A No.

14 Q Isn't it true, one of the accommodations you suggested  
15 was double coverage, is that correct?

16 A Correct.

17 Q Would Rite Aid still be able to offer immunizations at  
18 a store with double coverage?

19 A Yes. The other pharmacist could do the immunization.

20 Q So the idea with your double coverage accommodation  
21 then is that, is Mr. Stevens would do what?

22 A He could work at the locations where the pharmacies are  
23 big enough that they have to staff with more than one  
24 pharmacist on certain days because that's their high traffic  
25 days and maybe it means that he works two days at this

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1 location and two days at this location, or maybe it means  
2 that he just works part time at this location where he can  
3 work in tandem with another pharmacist that can give the  
4 immunizations. That allows Mr. Stevens to remain employed  
5 and finish out his career until he retires and Rite Aid gets  
6 to keep an experienced pharmacist.

7 Q Based on your experience, is that the type of  
8 accommodation you've seen employers make?

9 A I've seen employers make all sorts of accommodations  
10 through creative thinking.

11 Q You were asked some questions about Mr. Stevens'  
12 employability if he moved out of the area. Did you have, as  
13 part of your analysis here, did you do any research on the  
14 employment opportunities for pharmacists as a whole even  
15 outside of Central New York/Mohawk Valley region?

16 A Just in terms of prospects?

17 Q Yes.

18 A Yes, I did. I read a few articles regarding the  
19 current climate for recent pharmacy grads.

20 Q When you say articles, from what sorts of publications?

21 MR. RAVEN: Objection.

22 THE COURT: Basis?

23 MR. RAVEN: It's hearsay.

24 THE COURT: Well, no, if he asked her if she read  
25 an article, she said yes and he said what kind of publication



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1 was it. That's not hearsay. That's her observation of what  
2 she was reading.

3 MR. RAVEN: My objection might be a little  
4 premature.

5 THE COURT: It is premature.

6 MR. RAVEN: I might have to wait until the next  
7 couple of questions.

8 THE COURT: You will probably have to do that.

9 BY MR. WHITAKER:

10 Q Could you please answer the question?

11 A I'm sorry. Can you repeat the question?

12 MR. WHITAKER: Would you mind reading back the  
13 question, please.

14 (Record read back)

15 A Okay. There was an article published by a Dr. Daniel  
16 Brown in the Journal of Pharmacy Education where he spoke.

17 MR. RAVEN: Objection.

18 THE COURT: You can't tell us what's in the article  
19 yet.

20 THE WITNESS: Oh, sorry.

21 THE COURT: That's all right.

22 Q And this journal that you reviewed, is this something,  
23 is this of a reliable enough source, is this something you  
24 would typically rely upon in your field of expertise in  
25 making your analysis?

Karen Simone - Redirect

1 A Yes. It's an industry publication for pharmacists.

2 Q Okay. And based on your review of that information,  
3 what is your opinion in regards to the employment market for  
4 pharmacists as a whole?

5 MR. RAVEN: Same objection.

6 THE COURT: No. If she's -- I don't think he quite  
7 asked it but I think he's asking if that was an authoritative  
8 piece of literature in that article. She said she relied on  
9 it, it's a publication in her industry, so I guess that's  
10 sort of equivalent to saying it's authoritative. Was it  
11 authoritative?

12 THE WITNESS: Well, it is in the pharmacy industry.

13 THE COURT: That's what we're talking about in the  
14 pharmacy.

15 THE WITNESS: Yes. Doctor Brown is.

16 MR. WHITAKER: Is the it okay for her to answer?

17 THE COURT: Yes.

18 BY MR. WHITAKER:

19 A Doctor Brown is a thought leader in pharmacy education  
20 or pharmacy work force and so your question to me was what  
21 was my opinion about the job market?

22 Q Job prospects as a whole for pharmacists.

23 A That there right now is a surplus of pharmacists and  
24 recent pharmacy graduates, especially in New York State  
25 because of the explosion that we had in the early 2000s of

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1 pharmacy schools. Now they're graduating all of those  
2 pharmacists and it has saturated the market and so the job  
3 demand has remained level but the number of pharmacists has  
4 increased dramatically from 6,000 graduates in the early 2000  
5 to about 13,000 graduates a year now.

6 Q In your opinion does that serve as another barrier to  
7 Mr. Stevens' employability?

8 A Sure. It speaks to the competitiveness of the job  
9 market for pharmacists right now.

10 Q Miss Simone, there is a suggestion on cross that your  
11 practice might be limited to testifying in court. Can you  
12 just give the jury some background in terms of your actual  
13 work in the field of vocational rehabilitation?

14 A How far back do you want me to go?

15 Q Let's say in the last decade.

16 A In the last decade, I worked directly with people with  
17 disabilities and their supervisors to make job accommodations  
18 and coordinate return to works. I worked with Met Life  
19 Disabilities, the largest customer Raytheon. I would go and  
20 visit their plants, meet with their supervisors, do job  
21 analyses. Help the employers figure out how they can make  
22 changes to keep their employees at work. I also conducted  
23 employability analyses to make sure people were meeting the  
24 definition of employability as per the contract and I  
25 supervised the staff, that's when I moved into management.

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1 But do you want me to go on?

2 Q No. That's fine. You were also asked whether this was  
3 your first time testifying relative to a pharmacist, do you  
4 remember that?

5 A Correct.

6 Q Is it accurate to say that the methodology that you  
7 employ or that you utilize for your employment analysis is  
8 the same for any occupation?

9 A It's the same for any occupation. I do research on  
10 every case I get because in the field of rehabilitation,  
11 vocational rehabilitation, what we say in our industry is N  
12 equals one meaning every case is individual specific. No  
13 person has the same disability. No person has the same job  
14 requirements. It's like a fingerprint. So you have to treat  
15 that person as a brand new experience, that you have to do  
16 your research and understand all the facts.

17 Q There was some discussion with Mr. Raven about whether  
18 Mr. Stevens, in fact, used a job coach. If he had utilized a  
19 job coach, could that job coach have removed the barrier  
20 discussed which is his age?

21 A No. They can't remove barriers and they're expensive.  
22 They can only help coach to try to help him mitigate those  
23 barriers as much as they possibly can but they still exist.

24 Q And one of the things a job coach will do is help  
25 somebody revise their resume, is that correct?

Karen Simone - Redirect

1 A Well, I want to be specific. A job coach by definition  
2 in my field is somebody who goes on site with a person and  
3 helps them learn how to do a job. Generally, job coaches  
4 work with people with severe developmental disabilities that  
5 need constant supervision until the job becomes so routine  
6 that they can do it on their own because they have a severe  
7 disability because that's really what a job coach is.

8 A vocational counselor or a vocational  
9 rehabilitation counselor, somebody like myself, who has a  
10 rehabilitation degree and who has worked in that field will  
11 work with people like Mr. Stevens to try to the help them  
12 take the best approach.

13 Q If I'm understanding your testimony correctly, a job  
14 coach wouldn't have necessarily been of value to Mr. Stevens,  
15 it would have been a rehabilitation specialist?

16 A Yes. If we're using correct terminology.

17 Q Okay. I'm sorry.

18 A That's okay.

19 Q Just to clarify, with a vocational rehabilitation is  
20 they will do things like help somebody properly draft a  
21 resume?

22 A Correct.

23 Q The Department of Labor at the unemployment office,  
24 they also provide that service as well?

25 A That's correct.

Karen Simone - Redirect

1 Q So the services they provide are very similar to a  
2 vocational rehabilitationist?

3 A Well they're not schooled on dealing with impairments  
4 and limitations.

5 Q Based on everything that you reviewed, did Rite Aid  
6 offer Mr. Stevens, when they fired him, any sort of  
7 rehabilitation, vocational rehabilitation services?

8 MR. RAVEN: Objection.

9 THE COURT: Well, I don't think this witness has  
10 demonstrated that she has a knowledge of what Rite Aid knew  
11 at the time.

12 Let me have that question again, Vicky, would  
13 you, please.

14 (Record read back)

15 THE COURT: Well, I think she can -- I guess I was  
16 going the wrong way. I think she can answer that if she  
17 understands what Rite Aid did or didn't offer Mr. Stevens.

18 MR. WHITAKER: Yeah, Judge, if I may, I know we're  
19 going back aways. She, at the outset, indicated part of her  
20 review included deposition transcripts of Rite Aid employees,  
21 as well as Rite Aid's policies.

22 THE COURT: I remember that. That's true but that  
23 may not satisfy Mr. Raven.

24 MR. RAVEN: It has not.

25 THE COURT: Surprise.

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1 MR. RAVEN: Yeah, unless this witness has some  
2 personal knowledge or something that she read as to what Rite  
3 Aid did or didn't do afterwards, she cannot answer that  
4 question to begin with. And, secondly, I object on the  
5 grounds that you have to establish that Rite Aid had some  
6 obligation after he was terminated to do something and I  
7 don't believe that can be the case.

8 THE COURT: Well that's a separate question but  
9 your first question was more on target. She can only tell us  
10 based on what she knows from reviewing the documents that I  
11 was just advised of and advised of before in her testimony  
12 what she believes Rite Aid did or didn't do. She can tell us  
13 in her judgment whether or not, as far as her professional  
14 understanding was, whether or not it was everything that  
15 could have been, should have been done. So you can answer  
16 that part of it.

17 Do you know what we're talking about?

18 THE WITNESS: I'm not sure I do.

19 MR. WHITAKER: Well, Judge, if I may clarify. I  
20 believe that's the question I asked, it's based on what she's  
21 reviewed.

22 THE COURT: All right.

23 MR. WHITAKER: Well, while Dan rewrites it, can we  
24 get a formal ruling because I believe you initially indicated  
25 that question was proper because it's limited to what she has

Karen Simone - Redirect

1 reviewed as part.

2 THE COURT: You didn't say that initially but now  
3 we've got that clarified.

4 MR. WHITAKER: Okay.

5 THE COURT: You said based on everything.

6 MR. WHITAKER: Let me just ask the question again  
7 in a different way.

8 BY MR. WHITAKER:

9 Q So based on the materials that you've reviewed in this  
10 case and your interview of Mr. Stevens, is it your  
11 understanding or is it your opinion whether Rite Aid offered  
12 job rehabilitation to Mr. Stevens after they fired him?

13 MR. RAVEN: Objection. Same objection.

14 THE COURT: Same ruling. Overruled.

15 A I did not see anything in the file material or in my  
16 conversations with Mr. Stevens that out placement services  
17 were offered.

18 Q In your professional opinion is that something that  
19 Rite Aid should have done?

20 MR. RAVEN: Objection.

21 THE COURT: Overruled. I think that's her area of  
22 expertise. She can give us her opinion.

23 A I'm not sure that it should have been done. I think it  
24 could have been done.

25 Q The last thing I want to cover with you, Miss Simone,



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1 you received some questions regarding whether, you know,  
2 Mr. Stevens were to go get a job tomorrow he would have no  
3 future economic loss. But isn't it true that a new employer,  
4 if he were hired, could also offer less benefits than what  
5 Rite Aid offered?

6 A They could.

7 Q And what sort of employee benefits are potentially at  
8 issue?

9 A Well, salary of course being number one. Potentially  
10 could offer him less, knowing that he's out of work, they  
11 could try to get him for less because they know that the job  
12 market is saturated. There's healthcare coverage. There's  
13 retirement benefits.

14 Q Do employees --

15 A Vacation days.

16 Q Does the health care premium the employee might have to  
17 pay vary from employer to employer?

18 A It does.

19 MR. WHITAKER: That's all I have, your Honor.

20 THE COURT: Recross?

21 MR. RAVEN: Just a couple questions, Judge.

22 THE COURT: Okay.

23 RECROSS-EXAMINATION

24 BY MR. RAVEN:

25 Q Miss Simone, you gave some additional testimony just

Karen Simone - Recross

1 now about the market's flooded with pharmacists and new  
2 graduates and so forth, correct?

3 A There's a surplus right now, yes.

4 Q I'm not asking where you live in particular but what  
5 area do you live in?

6 A I live in Syracuse.

7 Q In Syracuse. Okay. And you get to travel around New  
8 York State a little bit?

9 A Not a lot, a little.

10 Q You see new pharmacies opening quite a bit, don't you?

11 A I guess I've never really taken note.

12 Q You don't know?

13 A No. Same one's been in my neighborhood for years.

14 Q You see one pharmacy open right across the street from  
15 another over the last five years?

16 A Well I know a few.

17 Q I guess what I'm asking, have you done any analysis,  
18 you personally, as to the number of stores that are opening  
19 and new stores opening, whether it be CVS, Rite Aid or  
20 Wegman's, have you done any personal analysis to see how many  
21 stores there are now as to, say, three years ago?

22 A No.

23 Q Or five years ago?

24 A No, I've done no analysis to number of stores.

25 Q And you've done no analysis, I assume, on the

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1 projection of the number of stores that will be open, new  
2 stores in, say, the next five years, you haven't done any  
3 analysis on that?

4 A No.

5 Q I just want to take you back for a moment. I think  
6 we're almost finished here. Mr. Whitaker was asking you  
7 questions about the other accommodations that Rite Aid could  
8 have made and one of them being putting Mr. Stevens in a  
9 store with two physicians, correct?

10 A Correct.

11 Q Now, pharmacists, do you have any first-hand knowledge  
12 as to how a pharmacy, such as Rite Aid, operates in terms of  
13 having two pharmacists in the same store?

14 A In terms of how they divide their job functions?

15 Q Or not the job functions but the hours in which they  
16 work, do you have any personal knowledge as to that  
17 whatsoever?

18 A If there's two pharmacists on staff together?

19 Q Correct.

20 A The hours they work -- I don't understand. I'm sorry.

21 Q Let me ask it this way: Are you assuming that any time  
22 that a store's open that has two pharmacists, that the  
23 pharmacists are going to be on duty for the entire time  
24 together, is that an assumption you're making?

25 A I would think if they're both scheduled to work from

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1 5 to 9 or 9 to 5 or whatever it is, then they're both there  
2 ready and willing to work.

3 Q Would you be open to the idea that sometimes when  
4 there's dual pharmacists, in fact, most of time when there's  
5 dual pharmacists at a bigger store or higher volume store,  
6 there are many times when there's still one pharmacist on  
7 duty at a time and there's only certain times that there's  
8 two pharmacists on duty. In other words, it's not 12 hours a  
9 day or 8 hours a day 5 days a week. Are you open to that  
10 idea?

11 A Yes, of course.

12 Q So there would be times then even in a dual pharmacy  
13 pharmacist situation where Mr. Stevens could, in fact, be by  
14 himself in that store?

15 A No. I think I misunderstood what you're saying. My  
16 understanding is that based on what I read from Mr. Spink's  
17 deposition transcript and what I understand is that there are  
18 certain stores that are large enough where they staff two  
19 pharmacists on at the same time.

20 Q You said Mr. Spink's deposition testimony?

21 A I believe it was Mr. Spink.

22 Q He was the pharmacy district manager in that area,  
23 that's your understanding?

24 A Right.

25 Q Did you also read the fact that he said that there was

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1 not two pharmacists on duty all the time and there are times  
2 where, even an individual such as Mr. Stevens in a dual  
3 pharmacist store could, in fact, be there by himself, do you  
4 recall reading that?

5 A No. But I believe what you say and, again, I'm just  
6 making this a suggestion for consideration that that could  
7 have been arranged without a lot of hardship.

8 Q Almost finished here. That accommodation would be an  
9 accommodation that would fully excuse Mr. Stevens from  
10 performing the essential job function of immunization,  
11 correct, it would excuse him completely?

12 A Correct.

13 Q And do you understand that under the Americans with  
14 Disability Act that the employer's not responsible to do  
15 that, do you understand that?

16 MR. WHITAKER: Objection, your Honor.

17 THE COURT: Sustained.

18 MR. RAVEN: I have no further questions.

19 THE COURT: Redirect?

20 MR. WHITAKER: Just a very simple question, Judge.

21 REDIRECT EXAMINATION

22 BY MR. WHITAKER:

23 Q Miss Simone, for all of that, the discussion about  
24 double coverage, isn't it true that in your professional  
25 opinion Rite Aid could have simply had Mr. Stevens work

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1 during the hours when we knew there was double coverage?

2 A Yes.

3 MR. WHITAKER: Thank you.

4 THE COURT: Anything further?

5 MR. RAVEN: No further questions.

6 THE COURT: Thank you, Miss Simone. You may step  
7 down, ma'am.

8 (Witness excused)

9 THE COURT: Out of witnesses?

10 MR. BERMAN: We are, your Honor. We have Raven's  
11 vocational rehab expert coming in out of order tomorrow  
12 morning followed by our economist and then we are resting.  
13 We're done.

14 THE COURT: So then you'll have an opportunity to  
15 begin with your witnesses after that.

16 MR. RAVEN: I can't get them for tomorrow. I will  
17 have one witness tomorrow morning and then I will have  
18 witnesses and hopefully go rather quickly through them on  
19 Tuesday and Wednesday.

20 THE COURT: All right. Ladies and gentlemen, we  
21 had a conference in the jury room about timing in part and I  
22 indicated to you that I was surprised that the trial was  
23 going to last longer than I had anticipated and maybe it's my  
24 fault that I anticipated wrongly. But the one thing that's  
25 important for you to do is not blame the attorneys because

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1 they have to put in what proof they think is necessary to  
2 support their side of the case, and it may be annoying to you  
3 and it may be annoying to me but that's not the point. The  
4 point is we've got parties on both sides and they're  
5 depending on you guys to do a fair and impartial evaluation  
6 of the proof and make a decision and I personally apologize  
7 to you for keeping you one minute longer than is necessary,  
8 but I think we're going to have to go through that. I know  
9 there's been cooperation from both sides. Neither attorney  
10 has been obstructive. Both attorneys have done the best they  
11 could to get the people in when they're available. So beyond  
12 that, I don't know else I can say.

13 So, right now we don't have any more  
14 witnesses, right? That means they're going home.

15 MR. BERMAN: That is correct, your Honor.

16 THE COURT: They don't mind that.

17 MR. BERMAN: It is a nice spring day.

18 THE COURT: Let me remind you, ladies and  
19 gentlemen, not to discuss the case among yourselves, with  
20 anybody else or permit anyone to discuss it with you. We'll  
21 see you tomorrow morning. Have a pleasant evening.

22 (Jury excused)

23 (Court stands adjourned)

CERTIFICATE OF OFFICIAL REPORTER

I, VICKY A. THELEMAN, Federal Official  
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/s/ Vicky A. Theleman

VICKY A. THELEMAN, RPR, CRR

US District Court - NDNY

Dated: April 10, 2015.

Vicky Ann Theleman, RPR, CRR  
USDC Court Reporter